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SUPREME COURT

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 543

NICHOLAS deB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES, ET. AL., APPELLANTS,

vs.

OLLIE McCLUNG, SR., AND OLLIE McCLUNG, JR.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

FILED _____

Supreme Court of the United States

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No.

NICHOLAS deB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES, ET. AL., APPELLANTS,

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INDEX

	Original	Print
Record from the United States District Court for the Northern District of Alabama		
Complaint	1	1
Proposed temporary restraining order	9	9
Order convening three-judge court	10	10
Notice of hearing	11	12
Request for admissions	12	13
Notice of motion to dismiss	14	15

	Original	Print
Record from the United States District Court for the Northern District of Alabama—Continued		
Motion to dismiss the complaint	15	16
Amendment to complaint	18	18
Request for additional admissions	20	20
Response to request for admissions	23	23
Objections to plaintiffs' request for additional admissions	27	25
Notice of hearing	31	30
Affidavit of Weaver Saterbak	32	31
Additional response to request for admissions	34	32
Opinion, per curiam	36	34
Order overruling motion to dismiss	52a	50
Temporary injunction	53	51
Notice of appeal to the Supreme Court of the United States	54	52
Proceedings of September 1, 1964	58	55
Appearances	58	55
Colloquy between Court and counsel	61	56
Testimony of Ollie McClung, Sr. direct	86	70
cross	111	84
redirect	115	86
Testimony of Ollie Mc Clung, Jr.	116	87
Ollie Mc Clung, Sr., recalled	120	89
Reporter's certificate (omitted in printing)	125	91
Clerk's certificate (omitted in printing)	126	91

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR., PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America; MACON L. WEAVER, as United States Attorney for the Northern District of Alabama; JOHN DOE and RUTH ROE, whose names are otherwise unknown, but who will be added by amendment when ascertained, DEFENDANTS

COMPLAINT—Filed July 31, 1964

Come the plaintiffs and aver as follows:

1. Plantiffs, father and son respectively, are citizens and residents of the city of Birmingham, Alabama; and are partners operating a restaurant as hereinafter alleged in said city. Defendant Robert F. Kennedy is Attorney General of the United States and as such is the person in charge of the enforcement of Public Law 88-352, 88th Congress, approved July 2, 1964 (78 Stat. 241) hereinafter referred to as the Civil Rights Act of 1964. Defendant Macon L. Weaver is United States Attorney for the Northern District of Alabama, the official representative and agent of the Attorney General of the United States within the Northern District of Alabama, and is a person whose official responsibility includes the enforcement of said Act under the direction of defendant Kennedy. Defendants John Doe and Ruth Roe are Negroes whose names and identities are un-

known but will be added when ascertained and who have participated in the acts herein alleged.

The amount in controversy in this action is in excess of $10,000.00. This Court has jurisdiction by virtue of the amount in controversy and the fact that a Federal question is involved.

2. Since, to-wit, 1926, Plaintiffs, or their predecessor J.O. McClung, have operated a restaurant at 902 Seventh Avenue, South, in Birmingham, Alabama, under the trade name "Ollie's Barbecue". Plaintiffs' restaurant serves food and non-alcoholic beverages and specializes [fol. 2] in barbecued meats and home-made pies of which, to-wit, some 90% of their business consists. Plaintiff's restaurant is operated in a one-story building located on a tract of land fronting some 200 feet on Seventh Avenue, South, and running 190 feet along Ninth Street, in Birmingham, Alabama. Such restaurant represents a capital investment of more than $200,000. Their premises provide parking spaces for approximately 90 automobiles and most of plaintiffs' customers come to its restaurant by car. Plaintiffs serve approximately 500,000 meals per year, with a gross volume of sales of approximately $350,000, substantially all of which are to local customers. Plaintiffs' restaurant will seat approximately 200 persons at tables, booths and at counter seats. Plaintiff employ some 36 persons, 26 of whom are Negroes, and 10 of which are white. Both Negroes and white employees, as well as plaintiffs themselves serve food to customers for consumption on plaintiffs' premises.

3. Plaintiffs' business is essentially local in character. It is located some eleven blocks from the nearest Federal or Interstate highway, except for a truck route one block away from which it derives no trade. It is approximately 17 blocks from the nearest railroad station, more than 20 blocks from the nearest bus station and more than five miles from the nearest airport. Plaintiffs do no advertising and make no effort to attract transient customers. Their trade has been received and retained by virtue of the excellent quality of the food and service and the wholesomeness of the surroundings. Plaintiffs' business has operated in substantially the same manner since 1926, and its trade has been largely derived from recommenda-

tion of its customers. To plaintiffs' knowledge, they serve no "interstate travelers", as that term is used in the Civil Rights Act of 1964. Plaintiffs purchase all the food served in their restaurant locally, and all of such food is delivered to them locally and is paid for locally.

4. Plaintiffs have maintained the policy of reserving, and on occasion exercising, the right to refuse service to any person not acceptable to plaintiffs and whose presence on plaintiffs' premises would, in plaintiffs' opinion, be either detrimental to its business or contrary to the desires and preferences of its customers. Plaintiffs have never served Negroes any food or beverages for consumption on plaintiffs' premises, and have elected not to do [fol. 3] so voluntarily in the lawful and legitimate exercise of their right to operate their business and to use their property in such manner.

5. On, to-wit, July 2, 1964, the so-called Civil Rights Act of 1964, having been enacted by the Congress of the United States, was approved by the President of the United States. In Title II of said Act, it is provided in part as follows:

> Sec. 201 (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> * * * *
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> * * * *

* * * * *

(c) The operations of an establishment affect commerce within the meaning of this title if * * * (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves or gasoline or other products which it sells, has moved in commerce;

6. Since the enactment and approval of said Act, members of the Negro race, whose names and identity are unknown to plaintiffs, but will be added by amendment when ascertained (herein referred to in part as John Doe and Ruth Roe), have entered plaintiffs' restaurant and have demanded service of food or beverages for consumption on plaintiffs' premises. Plaintiffs, in accordance with their aforesaid policy, and choice, have refused service to such persons and have declined to serve them. Neither plaintiffs, nor certain of their employees are willing to serve members of the Negro race and if required to do so, such service would be "involuntary" as that term is used in the Thirteenth Amendment of the Constitution of the United States, wherein it is provided that:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

[fol. 4] 7. Plaintiffs' restaurant is located in a part of the City of Birmingham largely occupied by Negro residences, and by industrial concerns employing a large number of Negro employees. It is within some three blocks of a Negro high school with an enrollment of between twelve and thirteen hundred pupils and within some five blocks of two Negro grammar schools, one public and one a Catholic parochial school. Many of the pupils enrolled at these schools pass by or near plaintiffs' restaurant daily. For many years, plaintiffs have served Negroes food orders on a "take-out" basis, i.e., for consumption away from plaintiffs' premises. Plaintiffs are proud of and feel justified in their trade slogan, "The World's Best Barbecue", and, in view of the

amount of food heretofore sold to members of the Negro race on a "take-out" basis, avers that its food is enjoyed by such persons and that, if allowed service for consumption on the premises, such persons would occupy plaintiffs' restaurant in large numbers, contrary to the desires of plaintiffs, their employees and their regular customers and to the exclusion of plaintiffs' present customers. Plaintiffs' business and property would thereby suffer great injury.

8. Both prior to and following the enactment of the so-called Civil Rights Bill of 1964, the President of the United States, has publicly stated that the Executive branch of the government will enforce said Act in all of its parts. Defendants Kennedy and Weaver are presently enforcing said Act in other proceedings pending in this Court. Under Section 204 of said Act a so-called "person aggrieved" may institute a civil action for enforcement of Title II thereof against any person who has engaged or is about to engage in any practice purportedly prohibited by Title II of said Act. Enforcement or attempts to enforce said Act against plaintiffs by either defendants or by other so-called "aggrieved" persons would subject plaintiffs to the burdens, inconvenience and expense of litigation and the aggravation of such burdens and expenses occasioned by a potential multiplicity of suits and would otherwise interfere with and damage plaintiffs' property and business, all of which would do serious injury to plaintiffs.

9. Defendants Kennedy and Weaver have, inter alia, instituted or participated in proceedings in this Court and other Courts of the United States in which they have purportedly relied on that portion of the aforesaid Act [fol. 5] providing, in effect, that a restaurant's operations "affect commerce" if a substantial portion of the food which it serves has merely moved in commerce and said defendants, together with the President of the United States are known to contend that such provision of the Act represents a proper exercise by Congress of its delegated powers, with which contention plaintiffs disagree. Plaintiffs further aver that, while all of its purchases of food are made locally, i.e., within the State of Alabama,

and the operation of its restaurant in no way affects interstate commerce in the sense required for any such regulation thereof to constitute a lawful exercise of the power of Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes, some of the food served by plaintiffs probably originates in some form outside the State of Alabama, Defendants or some of them contend or will contend that plaintiffs' restaurant is, on that account, within the purview of said Act, and will undertake to enforce the same under the provisions of Sections 204,205 or some other section thereof. Both the enforcement of said Act and the attempted enforcement thereof would do serious and irreparable injury to the plaintiffs.

10. Plaintiffs aver that the so-called Civil Rights Act of 1964 as it relates to restaurants and purports to be a legitimate exercise by Congress of its powers under the Interstate Commerce clause of the Constitution of the United States, is invalid and unconstitutional in that it exceeds the power therein given to the Congress; that this Nation is based upon the premise that all government is by consent of the governed and that the Congress of the United States has no power except as expressly or impliedly given by the Constitution and that no such power has been given to Congress under that document; that under the Tenth Amendment thereof, all powers not delegated are reserved to the States and to the people and that since neither the State of Alabama nor any subdivision thereof has any statute, ordinance or regulation requiring either the segregation or the integration of the races in plaintiffs' restaurant the right to determine how it shall be operated and its property used in this regard, is left to the plaintiffs. Plaintiffs having chosen voluntarily to operate their business and to use their property so as to decline to serve members of the Negro race, just as it has on occasion declined to serve others, are entitled to have such right and privilege protected by this Court. [fol. 6] Plaintiffs aver that their property and their investment therein are important property rights to them and that the enforcement of the so-called Civil Rights Act of 1964 against them as herein alleged, would de-

prive them of property without the due process of law, in violation of the Fifth Amendment to the Constitution of the United States. In the event plaintiffs or their employees should be required to serve persons they have chosen not to serve, the rights of the plaintiffs and their employees to be free from involuntary servitude under the Thirteenth Amendment of said Constitution would be violated. Plaintiffs further aver that the property rights upon which they rely are ancient and fundamental, won in a progression of blood struggles against tyrany in various forms, and that, there being no legitimate powers given to Congress by the Constitution, to interfere with plaintiffs' said rights in the manner attempted in said Act, any effort to enforce said Act against these plaintiffs would be invalid, in contravention of natural law and in violation of the Tenth Amendment of said Constitution. Plaintiffs aver, therefore, that the so-called Civil Rights Act of 1964 as applied to them, their property and their business, is illegal, invalid and violative of their rights under the Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States as well as other provisions thereof, and should be so held by this Court.

11. There is a real and genuine threat that unless enjoined and restrained by this Court, defendants, their agents, employees or successors, or those acting in concert with them, will seek to enforce said Act against plaintiffs to their irreparable and serious injury, in an amount far in excess of $10,000.00. Plaintiff has no adequate remedy in law and this Court should enjoin defendants from enforcing or seeking to enforce said Act as herein prayed on one or more of the following grounds:

1. That the so-called Civil Rights Act of 1964 is unconstitutional and invalid.
2. That Title II of said Act is unconstitutional and invalid.
3. That Title II of said Act as applied to restaurants is unconstitutional and invalid.
4. That Title II of said Act as applied to these plaintiffs is unconstitutional and invalid.

WHEREFORE, plaintiffs pray that this Court will take jurisdiction of this action and upon the issuance of proper process to the defendants, making them parties [fol. 7] hereto and upon a hearing in this cause, will enjoin, restrain and prohibit the defendants, their agents, employees, successors and those operating in concert with them from:

1. In any manner enforcing or attempting to enforce the so-called Civil Rights Act of 1964 against these plaintiffs.
2. Causing, sponsoring, participating in or encouraging any demonstration, riot or other activity injurious to plaintiffs' business in support of the contention that said Act applies to plaintiffs' business.
3. Interfering, either directly or indirectly, in any manner, with the operation of plaintiffs' business or the use of their property under the pretext of enforcing, seeking to enforce, or acting pursuant to, said Act.

And plaintiffs pray further that pending a hearing and final judgment in this action, this Court issue a temporary injunction or, in the alternative, a restraining order enjoining, restraining or prohibiting the defendants, their agents, employees, successors and those acting in concert with them from the above activities.

/s/ Robert McD. Smith
/s/ William G. Somerville
/s/ James H. Faulkner
Attorneys for Plaintiff

Lange, Simpson, Robinson & Somerville
317 North 20th Street
Birmingham, Alabama

Of Counsel

[fol. 8]

[Duly Sworn to by Ollie McClung, Jr.
Jurat Omitted in Printing.]

[fol. 9]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. ——

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America; MACON L. WEAVER, as United States Attorney for the Northern District of Alabama; JOHN DOE and RUTH ROE, whose names are otherwise unknown, but who will be added by amendment when ascertained, DEFENDANTS

PROPOSED TEMPORARY RESTRAINING ORDER

The foregoing Complaint having been presented to the Court and having been read and considered, it is hereby ordered that a temporary restraining order is hereby issued against the Defendants, their agents, employees, successors and those operating in concert with them from:

1. In any manner enforcing or attempting to enforce the so-called Civil Rights Act of 1964 against these plaintiffs.
2. Causing, sponsoring, participating in or encouraging any demonstration, riot or other activity injurious to plaintiffs' business in support of the contention that said Act applies to plaintiffs' business.
3. Interfering, either directly or indirectly, in any manner, with the operation of plaintiffs' business

or the use of their property under the pretext of enforcing, seeking to enforce, or acting pursuant to, said Act,

until further order of this Court or until the — day of August, 1964.

And Defendants are hereby ordered to show cause before this ourt on the -- day of August, 1964, a temporary injunction as prayed for in said Complaint should not be granted.

Done this — day of July, 1964.

.....

District Judge

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

Civil Action No. 64-448-So.

[File Endorsement Omitted]

OLLIE MCCLUNG, SR. and OLLIE MCCLUNG, JR.,
PLAINTIFFS

versus

ROBERT F. KENNEDY, AS ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA; MACON L. WEAVER, AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ALABAMA; JOHN DOE AND RUTH ROE, whose names are otherwise unknown, but who will be added by amendment when ascertained, DEFENDANTS

ORDER CONVENING THREE-JUDGE COURT—Aug. 4, 1964

WHEREAS Honorable Elbert P. Tuttle, Chief Judge of the United States Court of Appeals for the Fifth Circuit

is outside of the Circuit and temporarily unable to perform his duties as Chief Judge; and WHEREAS the undersigned is a Circuit Judge in active service, present in the Circuit, under 70 years of age, next in precedence, and able and qualified to act as Chief Judge pursuant to Title 28, United States Code, Section 45 (d); and WHEREAS, in my judgment, the public interest so requires; and

The Honorable Seybourn H. Lynne, United States District Judge for the Northern District of Alabama, to whom an application for injunction and other relief has been presented in the above-styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of three judges, I, Richard T. Rives, as Acting Chief Judge of the Fifth Circuit, hereby designate the Honorable Walter P. Gewin, United States Circuit Judge, and the Honorable H. Hobart Grooms, United States District Judge for the Northern District of Alabama, to serve with Judge Lynne as members of, and with him to constitute the said court to hear and determine the action.

WITNESS MY HAND this 4th day of August 1964.

/s/ Richard T. Rives,
Acting Chief Judge.

[fol. 11]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

OLLIE McCLUNG, SR. and OLLIE McCLUNG, JR.,
PLAINTIFFS

vs.

ROBERT F. KENNEDY, as Attorney General of the United States of America; ET AL, DEFENDANTS

NOTICE OF HEARING—Aug. 5, 1964.

Pursuant to the provisions of Title 28, Section 2284, notice is hereby given that the above-styled action has been set down for hearing on the prayer of plaintiffs for a temporary injunction on Tuesday, September 1, 1964, at 10:00 o'clock. a. m., in Courtroom No. 1 of the United States District Court, in Birmingham, Alabama, before the Honorable Walter P. Gewin, United States Circuit Judge, the Honorable Seybourn H. Lynne, Chief Judge, United States District Court, and the Honorable H. H. Grooms, Judge, United States District Court.*

This the 5th day of August, 1964.

WILLIAM E. DAVIS
Clerk, U. S. District Court,
Northern District of Alabama

* Counsel are required to file briefs on or before August 24 1964, with copy thereof to each one of the above-designated judges. All communications to Judge Walter P. Gewin may be addressed to Tuscaloosa, Alabama.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America; MACON L. WEAVER, as United States Attorney for the Northern District of Alabama; JOHN DOE and RUTH ROE, whose names are otherwise unknown, but who will be added by amendment when ascertained, DEFENDANTS

REQUEST FOR ADMISSIONS—Filed Aug. 18, 1964

Come the plaintiffs and request that the defendants and each of them separately and severally within a period of ten days after the service hereof make the following admissions (for the purposes of this action only, and subject to all proper objections to admissibility which may be interposed at trial):

1. That defendant Robert F. Kennedy, is Attorney General of the United States and as such is the person charged with the enforcement of the legislation known as the Civil Rights Act of 1964.

2. That defendant Macon L. Weaver is United States Attorney for the Northern District of Alabama, and as such is an agent for defendant Kennedy within the Northern District of Alabama.

3. That defendants Kennedy and Weaver are attorneys of record in that certain action pending in this Court styled and further identified as United States of America,

by Robert F. Kennedy, Attorney General, Plaintiff v. Arthur B. Catrino, et al., Civil Action No. 64-443, in this Court and in said suit are enforcing or attempting to enforce said Civil Rights Act of 1964 against the defendants therein named.

4. That this Court has jurisdiction of this action.

5. That defendant Robert F. Kennedy as Attorney General of the United States will, unless enjoined by this Court, enforce or attempt to enforce said Act against the plaintiffs or the plaintiffs' restaurant as described in the Complaint.

6. That plaintiffs have no adequate remedy of law.

/s/ Robert McD. Smith
Attorney for Plaintiffs

[fol. 13]

Lange, Simpson, Robinson & Somerville
317 North 20th Street
Birmingham, Alabama

William G. Somerville, Jr.
317 North 20th Street
Birmingham, Alabama

James H. Faulkner
Frank Nelson Building
Birmingham, Alabama

Of counsel

CERTIFICATE OF SERVICE [omitted in Printing]

[fol. 14]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448-S

[File Endorsement Omitted]

OLLIE McCLUNG, SR., and OLLIE McCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

NOTICE OF MOTION TO DISMISS—Filed Aug. 19, 1964

TO: LANGE, SIMPSON, ROBINSON & SOMERVILLE
317 N. 20th St. Birmingham, Alabama
James H. Faulkner
533 Frank Nelson Bldg.
Birmingham, Alabama

Attorneys for the Plaintiffs

Please take notice that the undersigned will bring the attached motion to dismiss the complaint on for hearing before this Court at the United States Courthouse, Birmingham, Alabama on August 24, 1964, at 10:00 a.m. or as soon thereafter as counsel may be heard.

/s K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-443-S

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

MOTION TO DISMISS THE COMPLAINT—Filed Aug. 19, 1964

Comes now Robert F. Kennedy, Attorney General of the United States, and Macon L. Weaver, United States Attorney for the Northern District of Alabama, and, specifically limiting their appearance to the sole purpose of advancing the instant motion and not submitting generally by this appearance to the jurisdicion of this Court, nor to service of process, nor waiving hereby the inadequacy and impropriety of service of process herein, and move this Court to dismiss the pending complaint for the reasons set forth hereinafter:

(1) This Court lacks jurisdiction over Robert F. Kennedy, Attorney General of the United States, in this suit since, under Rule 4(f), Federal Rules of Civil Procedure, process of this Court other than a subpoena may be served only within the territorial limits of the State of Alabama, and the defendant Kennedy was not personally served within the State of Alabama.

[fol. 16] (2) Robert F. Kennedy, Attorney General of the United States, is an indispensable party to this action, and service of process upon him being deficient, Macon L. Weaver, United States Attorney for the North-

ern District of Alabama, is not a property party defendant.

(3) The complaint fails to state a claim upon which relief can be granted.

(4) This Court lacks equitable jurisdiction because plaintiffs have an adequate remedy by way of defense to any proceeding to enforce Title II of the Civil Rights Act of 1964 against them.

/s/ K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[Certificate of Service Omitted in Printing.]

[fol. 17] * * *

[fol. 18]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR. and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America; ET AL, DEFENDANTS

AMENDMENT TO COMPLAINT—Filed Aug. 21, 1964

Come now the plaintiffs, Ollie McClung, Sr. and Ollie McClung, Jr., and, without conceding that the original service of the summons and complaint heretofore made in this cause upon defendant Robert F. Kennedy, Attorney General of the United States, was deficient or that the Court did not acquire jurisdiction over said defendant Robert F. Kennedy by such service, and specifically reserving the right to oppose ground (1), and each and every other ground, urged in support of the motion of defendants Robert F, Kennedy and Macon L. Weaver to dismiss the complaint, hereby amend their complaint heretofore filed in this cause as follows:

1. By striking from the caption of said complaint the following words:

> "JOHN DOE and RUTH ROE, whose names are otherwise unknown, but who will be added by amendment when ascertained,"

2. By striking from paragraph 1 of said complaint the following words:

"Defendants John Doe and Ruth Roe are Negroes whose names and identities are unknown but will be added when ascertained and who have participated in the acts herein alleged."

[fol. 19] 3. By striking from paragraph 6 of said complaint the following words:

"but will be added by amendment when ascertained (herein referred to in part as John Doe and Ruth Roe),"

4. By dropping and dismissing as parties defendant in said complaint and in the action all persons whose names appear in said complaint except Robert F. Kennedy, as Attorney General of the United States of America, and Macon L. Weaver, as United States Attorney for the Northern District of Alabama.

5. By inserting after the last sentence of paragraph 10 of said complaint the following words:

"Plaintiffs aver additionally that the Civil Rights Act of 1964 as applied to them, their business and its operation by them, and the enforcement by defendants of said Act as to them, would abridge and violate the freedoms and rights of plaintiffs protected by the First Amendment to the Constitution of the United States, and that, therefore, the Civil Rights Act of 1964 as applied to them, their business and its operation, is illegal and invalid under the First Amendment to the Constitution of the United States, and should be so held by this Court."

/s/ Robert McD. Smith
/s/ William G. Somerville
/s/ James H. Faulkner
Attorneys for Plaintiffs

OF COUNSEL:
LANGE, SIMPSON, ROBINSON & SOMERVILLE
EXCHANGE SECURITY BANK BUILDING
BIRMINGHAM, ALABAMA

Allowed

/s/ Seybourn H. Lynne,
Judge
September 1, 1964.

[fol. 20]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE McCLUNG, SR., et al, PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al, DEFENDANTS

REQUEST FOR ADDITIONAL ADMISSIONS—Filed Aug. 24, 1964

Come the plaintiffs and request that the defendants and each of them separately and severally within a period of ten days after the service hereof make the following admissions (for the purposes of this action only, and subject to all proper objections to admissibility which may be interposed at trial):

7. That while testifying before the Committee on the Judiciary of the United States Senate, in connection with propsed legislation identified as S. 1731, Defendant Kennedy made the following statements and answers on Wednesday, July 31, 1963:

> *Attorney General Kennedy.* "Well, I think if he ran a restaurant, Senator, he would be covered, under (3)(ii), so I don't think it would be very difficult. Subsection (3)(ii) covers establishments where "A substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce.' What we intend to cover are hotels, motels, depart-

ment stores, restaurants, variety stores and similar places." *Hearings*, p. 227.

* * * *

Attorney General Kennedy. "I would say, Senator, that you could tell him that generally if he runs an eating establishment that he has an effect on interstate commerce, and that he would be covered. So I don't see that there is a problem for him, if that is the great difficulty as to whether he is or is not covered. I would think that restaurants generally would be covered under this bill." *Hearings*, p. 229.

8. That defendant Kennedy contends that a restaurant which serves food, 20% of which has at any time and in any form moved across state lines, is a place of public accommodations under Title II of the Civil Rights Act of 1964.

9. That defendant Kennedy contends that a restaurant which serves food, 10% of which has at any time and in any form moved across state lines, is a place of public [fol. 21] accommodations under Title II of the Civil Rights Act of 1964.

10. That defendant Kennedy contends that a restaurant which serves food, 1% of which has at any time and in any form moved across state lines, is a place of public accommodations under Title II of the Civil Rights Act of 1964.

11. That it is the policy of defendant Kennedy in his official capacity as Attorney General of the United States to enforce fully the provisions of Title II of the Civil Rights Act of 1964, against any place of public accommodation which refuses to serve Negroes because of their color.

12. That the averments of the Complaint in this action are sufficient to cause defendant Kennedy, as Attorney General of the United States to have reasonable cause to believe that the plaintiffs are engaged in a pattern or practice of resistance to the full enjoyment of some of the rights purportedly secured by Title II of that Act, and that such pattern or practice is of such a nature and is intended to deny the full exercise of said rights and that it is the policy of defendant Kennedy as Attorney General

of the United States, under such circumstances, to use the powers given him under Section 206 of said act to compel compliance by plaintiffs with the provisions of the Act.

13. That defendant Kennedy personally sponsored and encouraged the passage of the Civil Rights Act of 1964 and intends in his official capacity fully to carry out its provisions against all places of public accommodation which do not voluntarily comply with the provisions of Title II of the said Act.

14. That, assuming that a substantial portion of the food served at plaintiffs' restaurant has moved in interstate commerce, defendant Kennedy as Attorney General of the United States will, unless enjoined by this Court, enforce or attempt to enforce said act against the plaintiffs or their restaurant.

15. That defendants have the opinion that Title II of the Civil Rights Act of 1964, insofar as it relates to restaurants, is a valid exercise of the powers given Congress under the Constitution of the United States.

/s/ Robert McD. Smith
Attorney for Plaintiffs

Lange, Simpson, Robinson & Somerville
317 North 20th Street
Birmingham, Alabama

William G. Somerville, Jr.
317 North 20th Street
Birmingham, Alabama

[fol. 22]

James H. Faulkner
Frank Nelson Building
Birmingham, Alabama
Of counsel

CERTIFICATE OF SERVICE [Omitted in Printing]

[fol. 23]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448-S

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

RESPONSE TO REQUEST FOR ADMISSIONS—Filed Aug. 24, 1964

Come now Robert F. Kennedy, Attorney General of the United States of America, and Macon L. Weaver, United States Attorney for the Northern District of Alabama, and in reply to the request for admissions filed by the plaintiffs herein make replies as follows:

1. The defendants admit that Robert F. Kennedy is the Attorney General of the United States. His responsibilities for the enforcement of the Civil Rights Act of 1964 are defined by that Act.

2. The defendants admit that Macon L. Weaver is the United States Attorney for the Northern District of Alabama. His responsibilities are defined by statute.

3. Paragraph 3 is admitted.

4. The defendants admit that this Court is the proper forum to dispose of this case. However, the defendants by their Motion to Dismiss have denied jurisdiction over Mr. Kennedy and have questioned whether the plaintiffs have stated a claim.

[fol. 24] 5. The defendants can neither admit nor deny statement 5 because the defendants are not at this time

in possession of sufficient information to determine whether and to what extent the operation of plaintiffs' restaurant is a public accommodation within the meaning of the Act. The plaintiffs have not conceded that the operation of their restaurant is within the Act. The defendants have already stated in their Memorandum in Support of the Motion to Dismiss (footnote 10 page 15) that they have not contemplated suit against plaintiffs.

6. The defendants deny statement 6, for the reasons set forth in their Memorandum in Support of the Motion to Dismiss.

MACON L. WEAVER
United States Attorney

/s/ K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[fol. 25]

[*Duly sworn to by K. William O'Connor jurat omitted in printing (all in italics)*]

[fol. 26]

CERTIFICATE OF SERVICE [Omitted in Printing]

[fol. 27]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., et al., PLAINTIFFS

vs.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

OBJECTIONS TO PLAINTIFFS' REQUEST FOR ADDITIONAL ADMISSIONS—Filed Aug. 31, 1964

Comes now the defendants Kennedy and Weaver and object to the plaintiffs' request for admissions 7 through 15, as follows:

REQUESTED ADMISSION 7

That while testifying before the Committee on the Judiciary of the United States Senate, in connection with proposed legislation identified as S 1731, defendant Kennedy made the following statements and answers on Wednesday, July 31, 1963:

Attorney General Kennedy. Well, I think if he ran a restaurant, Senator, he would be covered, under (3) (ii), so I don't think it would be very difficult. Subsection (3) (ii) covers establishments where "A substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire has moved in interstate commerce." What we intend to cover are hotels, motels, depart-

ment stores, restaurants, variety stores and similar places. Hearings, p. 227.

* * * *

Attorney General Kennedy. I would say, Senator, that you could tell him that generally if he runs an eating establishment that he has an effect on interstate commerce, and that he would be covered. So I don't see that there is a problem for him if that is the great difficulty as to whether he is or is not covered. I would think that restaurants generally would be covered under this bill. Hearings, p. 229.

OBJECTIONS

The admission requested is not evidentiary in nature and is irrelevant to any matter now before this Court. The legal history of the Civil Rights Act of 1964 is set forth in public records and is as available to the plaintiffs as to the defendants and may be cited to the Court by the defendants if they deem it appropriate.

It is conceded that the Congressional Record accurately reflects the proceedings therein reported.

REQUESTED ADMISSIONS 8 THROUGH 10, INCLUSIVE

That defendant Kennedy contends that a restaurant which serves food 20 per cent of which has at any time and in any form moved across state lines, is a place of public accommodations under Title II of the Civil Rights Act of 1964.

[fol. 28] That defendant Kennedy contends that a restaurant which serves food, 10 per cent of which has at any time and in any form moved across state lines, is a place of public accommodations under Title II of the Civil Rights Act of 1964.

That defendant Kennedy contends that a restaurant which serves food, 1 per cent of which has at any time and in any form moved across state lines, is a place

of public accommodations under Title II of the Civil Rights Act of 1964.

OBJECTIONS

Since these three requests are identical except for the figures used, they are treated as one and jointly answered as follows.

The requests do not seek any relevant evidentiary facts, but ask for the legal opinion of the Attorney General of the United States and of the United States Attorney on patently hypothetical facts.

The plaintiffs have assiduously avoided stating facts sufficient to determine whether their operation is covered under the Civil Rights Act of 1964 or not. In lieu of evidence, the requested "admissions" seek a speculative opinion on hypothetical facts. These requests serve to emphasize the lack of any real case or controversy.

REQUESTED ADMISSION 11

That it is the policy of defendant Kennedy in his official capacity as Attorney General of the United States to enforce fully the provisions of Title II of the Civil Rights Act of 1964, against any place of public accommodations which refuses to serve Negroes because of their color.

OBJECTIONS

The information sought is irrelevant and cannot lead to the discovery of any relevant evidence in that a general purpose of the Attorney General to perform the duties of his office cannot give the plaintiffs herein any right to relief.

REQUESTED ADMISSION 12

That the averments of the Complaint in this action are sufficient to cause defendant Kennedy, as Attorney General of the United States to have reasonable cause to believe that the plaintiffs are engaged in a

pattern or practice of resistance to the full enjoyment of some of the rights purportedly secured by Title II of that Act, and that such pattern or practice is of such a nature and is intended to deny the full exercise of said rights and that it is the policy of defendant Kennedy as Attorney General of the United States, under such circumstances, to use the powers given him under Section 206 of said Act to compel compliance by plaintiffs with the provisions of the Act.

OBJECTIONS

This request does not seek evidence or information which can lead to the discovery of evidence, but rather seeks a legal opinion of the Attorney General regarding the sufficiency of the allegations of plaintiffs' complaint.

[fol. 29]

REQUESTED ADMISSION 13

That defendant Kennedy personally sponsored and encouraged the passage of the Civil Rights Act of 1964 and intends in his official capacity fully to carry out its provisions against all places of public accommodation which do not voluntarily comply with the provisions of Title II of the said Act.

OBJECTIONS

While the requested admission seeks entirely irrelevant information, the legislative history of the present Act publicly records defendant Kennedy's position on the passage of the Civil Rights Act of 1964.

There is no basis for requesting an advisory opinion from defendant Kennedy as to what his specific intentions might be as to nonspecific hypothetical situations not necessarily subject to the Civil Rights Act of 1964.

REQUESTED ADMISSION 14

That assuming that a substantial portion of the food served at the plaintiffs' restaurant has moved in in-

terstate commerce, defendant Kennedy As Attorney General of the United States will, unless enjoined by this Court, enforce or attempt to enforce said act against the plaintiffs or their restaurant.

OBJECTIONS

This requested admission again seeks an irrelevant advisory opinion of the Attorney General of the United States based on hypothetical facts.

REQUESTED ADMISSION 15

That defendants have the opinion that Title II of the Civil Rights Act of 1964, insofar as it relates to restaurants, is a valid exercise of the powers given Congress under the Constitution of the United States.

OBJECTIONS

This request is not directed to the obtaining of any evidence nor to any information which could lead to evidentiary facts.

The attention of the plaintiffs is invited to the Memorandum in Support of Motion to Dismiss and in Opposition to the Prayer for Preliminary Injunction, hereinbefore filed by the defendants Kennedy and Weaver, for a detailed response to this requested admission.

MACON L. WEAVER
United States Attorney

/s/ K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[fol. 30]

[*Duly sworn to by W. William O'Connor jurat omitted in printing (all in italics)*]

CERTIFICATE OF SERVICE [Omitted in Printing]

[fol. 31]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., et al., PLAINTIFFS

vs.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

NOTICE OF HEARING—Filed Aug. 31, 1964

TO: Lange, Simpson, Robinson & Somerville
317 North 20th Street
Birmingham, Alabama

James H. Faulkner
Frank Nelson Building
Birmingham, Alabama

Please take notice that the undersigned will bring on for hearing the attached Objections to Plaintiffs' Request for Additional Admissions hereinbefore filed, such hearing to be set at the convenience of the Court in accordance with Rule 36 of the Federal Rules of Civil Procedure.

/s/ K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

Filed September 1, 1964, William E. Davis, Clerk by GEB

OLLIE McCLUNG, SR. and OLLIE McCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, ET AL, DEFENDANTS

AFFIDAVIT OF WEAVER SATERBAK

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, the undersigned, appeared Weaver Saterbak, who having been duly sworn deposed on oath and said:

I am Weaver Saterbak of Birmingham, Alabama. I am Office Manager of the Birmingham branch of Geo. A. Hormel & Company. This company has its principal office in Minnesota and is engaged in the business of slaughtering, processing and selling meats for human consumption.

According to the records in my office Ollie's Barbecue at Birmingham, Alabama, during the twelve month period from July 1, 1963, to July 1, 1964, purchased from Geo. A. Hormel & Company pork and beef for the total cost of $69,683.00. All of Ollie's purchases were made locally from the Birmingham branch, all orders were received by the Birmingham branch and all billing and collections handled by the Birmingham branch.

[fol. 33] All the meat sold to Ollie's was received by Hormel at its Birmingham branch from other facilities

of Hormel located outside the State of Alabama. Ollie's orders were filled from the warehouse in Birmingham. The cuts sold to Ollie's were regular cuts of a type normally used by restaurants specializing in Barbecue.

/s/ Weaver Saterbak
WEAVER SATERBAK

SWORN to and subscribed before me this 31st day of August, 1964.

/s/ Robert McD. Smith
Notary Public

Allowed
Sept. 1, 1964
/s/ Seybourn H. Lynne, Judge.

[fol. 34]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR., and OLLIE MCCLUNG, JR.,
PLAINTIFFS

v.

ROBERT F. KENNEDY, as Attorney General of the United States of America, et al., DEFENDANTS

ADDITIONAL RESPONSE TO REQUEST FOR ADMISSIONS—
Filed Sept. 2, 1964

Come now Robert F. Kennedy, Attorney General of the United States of America, and Macon L. Weaver,

United States Attorney for the Northern District of Alabama, and in reply to the eleventh request for admissions filed by the plaintiffs herein make reply as follows:

REQUESTED ADMISSION #1

That it is the policy of defendant Kennedy in his official capacity as Attorney General of the United States to enforce fully the provisions of Title II of the Civil Rights Act of 1964, against any place of public accommodations which refuses to serve Negroes because of their color.

RESPONSE

It is the policy of the Attorney General to enforce the Civil Rights Act of 1964.

MACON L. WEAVER
United States Attorney

/s/ K. William O'Connor
K. WILLIAM O'CONNOR
Attorney, Department of Justice
Washington, D. C.

[*Duly sworn to by K. William O'Connor jurat omitted in printing (all in italics)*]

[fol. 35]

CERTIFICATE OF SERVICE [Omitted in Printing]

[fol. 36]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR. and OLLIE MCCLUNG, JR.,
PLAINTIFFS

vs.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States of America; ET AL, DEFENDANTS

Before GEWIN, Circuit Judge, and LYNNE and GROOMS, District Judges.

OPINION, PER CURIAM—Sept. 17, 1964

PER CURIAM: This is a suit by the owners and operators of a restaurant business in Birmingham, Alabama, seeking to enjoin the enforcement of the provisions of title II of the Civil Rights Act of 1964[1] on the ground that they are unconstitutional. A statutory three-judge court was convened pursuant to 28 U.S.C.A. § 2282, and the case was set down for hearing on September 1, 1964, on plaintiffs' prayer for a temporary injunction. Prior to the hearing the defendants moved to dismiss the complaint on the separate grounds that (1) the court lacks jurisdiction over defendant Robert F. Kennedy[2] as Attorney General of the United States, be-

[1] Public Law 88-352; 78 Stat. 241.

[2] Since Robert F. Kennedy tendered his resignation as Attorney General of the United States, which was accepted after submission of this case to the court and since Nicholas deB. Katzenbach has been appointed Acting Attorney General of the United States, the

cause of insufficient service of process; (2) since defendant Robert F. Kennedy is an indispensable party, the insufficiency of service of process upon him renders co-defendant Macon L. Weaver, United States Attorney for [fol. 37] the Northern District of Alabama, an improper party defendant; (3) the complaint fails to state a claim upon which relief can be granted; and, (4) the court lacks equitable jurisdiction because plaintiffs have an adequate remedy at law. This motion was heard by and submitted to the full court on briefs and oral argument of counsel on September 1, 1964, and was taken along with plaintiffs' prayer for a temporary injunction.

THE MOTION TO DISMISS

The first two grounds for dismissal, both based upon the theory that service of process upon the Attorney General was defective, are no longer in issue. Service of process upon the Attorney General was made initially by certified mail in accordance with the provisions of 28 U.S.C.A. § 1391(e), and defendants contended that because fictitious parties were joined as defendants the provisions of section 1391(e) were inapplicable. Thereafter, plaintiffs amended their complaint by striking and dismissing therefrom the unserved fictitious parties and caused the complaint as amended to be re-served upon the Attorney General under section 1391(e). It was conceded by counsel for defendants on argument that the first two grounds in their motion to dismiss were thereby eliminated and accordingly are considered abandoned.

Defendants have also insisted in their brief and oral argument that the complaint does not present an actual controversy between the parties and that the adequacy of legal remedies deprives this court of equitable jurisdiction. These grounds were argued in the hearing on plaintiffs' prayer for temporary injunction at which evidence

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said Katzenbach is hereby substituted, in his official capacity, for the said Kennedy as a party defendant, as provided by Rule 25(d)(1) Fed. R. Civ. P.

[fol. 38] was adduced developing the undisputed facts set out below.[3]

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[3] 1. Plaintiffs are partners operating a restaurant under the trade style "Ollie's Barbecue" at 902 Seventh Avenue South, in Birmingham.

2. The plaintiffs' family has operated such restaurant under the same name and at the same location since 1927.

3. Plaintiffs' restaurant specializes in barbecued meats and home-made pies; approximately 90 to 95 per cent of its sales consist of such items and nonalcoholic beverages.

4. Plaintiffs' restaurant, when filled to capacity, will seat approximately 220 persons; its trade is derived from local regular customers who are for the most part known to the plaintiffs; its trade is predominantly composed of white collar business people and family groups. Plaintiffs feature in their restaurant a wholesome atmosphere in which no profanity or consumption of alcoholic beverages is allowed. The restaurant is closed on Sunday. Plaintiffs have in the past declined service to persons who have been profane and have given the appearance of drinking alcoholic beverages.

5. Plaintiffs' restaurant is located in an area of Birmingham in which are located primarily residences occupied by Negroes and light industrial development; in the nearby vicinity are several Negro churches and schools attended by Negro children.

6. The restaurant is eleven blocks from the nearest interstate highway, a somewhat greater distance from the nearest railroad station and bus station and between six and eight miles from the nearest airport.

7. Plaintiffs seek no transient trade and do no advertising of any kind except for the maintenance of a sign on their own premises. To their knowledge plaintiffs serve no interstate travelers.

8. In the twelve months preceding the passage of the Civil Rights Act of 1964, plaintiffs purchased approximately $150,000 worth of food, all locally. Approximately 55 per cent of this was for meat and between 80 and 90 percent of the meat purchases were from George A. Hormel & Company at its Birmingham branch. Its purchases from Hormel for that period were shown to be $69,783. All of the meat purchased from Hormel was shipped to its Birmingham branch from outside the State of Alabama.

9. Plaintiffs employ 36 persons at their restaurant, approximately two-thirds of whom are Negro. Plaintiffs personally prepare food and serve customers. Plaintiffs and some of their employees would not voluntarily serve meals to Negroes.

10. Since July 2, 1964, plaintiffs have not complied with the Civil Rights Act of 1964; they have, in fact, on more than one occasion, refused service to Negroes on an equal basis with white customers and on such occasions plaintiffs have been in actual viola-

Contending that there has not been a sufficient showing of a specific threat of immediate enforcement of title II of the act as to the plaintiffs, defendants insist alternatively that it is not alleged that defendants either have instituted enforcement proceedings against the plaintiffs or have conducted an investigation to determine whether plaintiffs have violated the act, and that insufficient facts are alleged to bring the plaintiffs within the coverage of the act.

[fol. 39] In urging that the allegations are insufficient to show coverage, defendants point first to averments in the complaint respecting the remoteness of plaintiffs' business from any place normally frequented by interstate travelers, the absence of any advertising by them and the averment that to their knowledge they serve no "interstate travelers" as that term is used in the act. It is true that these allegations, substantiated by evidence at the hearing, tend strongly to indicate an absence of coverage under title II insofar as it relates to a restaurant which "serves or offers to serve interstate travelers", and defendants have made no contention that they are covered by virtue of that part of the act.

Defendants then seize upon the averment that "some" of the food served in plaintiffs' restaurant originated in some form outside of Alabama. This use of the word [fol. 40] "some", say defendants, is insufficient because the act uses the term "substantial" in defining the portion of a restaurant's food which must move in commerce in order that it be within the alternative criterion of coverage prescribed by section 201(e)(2). We are of the opinion that the meaning of the term "substantial" as there used must and can only be determined judicially, and we conclude as a matter of law, on the basis of objective evidence, that a "substantial" portion of the

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tion of the act.

11. Because of their location and the manner of conducting their business, plaintiffs would lose a substantial amount of business if forced to serve Negroes in their restaurant. From its beginning, plaintiffs' restaurant has served only white trade.

12. A substantial portion of the food served in plaintiffs' restaurant has moved in commerce and plaintiffs have, since July 2, been in violation of the Civil Rights Act of 1964.

food served by plaintiffs has moved in commerce within the meaning of the act.

As defendants note, the complaint avers neither that enforcement proceedings have been instituted against plaintiffs nor that their restaurant was investigated by defendants prior to the commencement of the action. Plaintiffs do aver that prior to its filing they had violated the provisions of title II applicable to their restaurant by refusing to provide service to Negroes on the same basis as they provide to their other customers, and the evidence shows that since its commencement they have consistently continued and will continue thus to violate the act. In this respect alone the circumstances of this case are quite different from those existing in the cases urged by defendants in support of their position that this suit presents no justiciable controversy.

One of the plaintiffs testified further that he was caused in large part to institute this action by the fact that the defendants two days previously had filed in this court an enforcement suit against other persons operating restaurants of a similar character, and it appears from the complaint in that suit [4] that the act's coverage was invoked in part upon the basis that a substantial part of their food had moved in commerce. And plainly the Attorney General has indicated an intention to enforce [fol. 41] the provisions of title II as against its violators. We cannot say, in these circumstances, that enforcement against plaintiffs was not reasonably imminent when this action was commenced, and no case cited by defendants or found by us has held under comparable circumstances that for this reason an actual controversy did not exist.

There are, moreover, many instances in which a threat of imminent enforcement of a law has not been considered requisite to the existence of a justiciable controversy or the exercise by federal courts of equitable jurisdiction in similar suits seeking anticipatory relief from the operation and enforcement of the law.

In their complaint plaintiffs attack the validity of title II of the act in its entirety. The act requires in positive

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[4] Civil Action No. 64-443, Northern District of Alabama.

terms that the plaintiffs, in the operation of their restaurant, afford to all persons "the full and equal enjoyment of the goods, services [and] facilities." Consequently, as to the plaintiffs, title II creates a mandatory duty to which it commands immediate obedience. As against this, the plaintiffs contend, and it is the object of this suit to determine, that they have a constitutional right to operate their business free of the restrictions now imposed upon it by the act. They aver, and have shown by evidence, that these requirements of title II will cause substantial and irreparable injury to their business. Thus, the substance of the allegations and proof is that the provisions of title II and the duty it imposes constitute a present injurious impingement upon the plaintiffs' property rights. The existence of a justiciable controversy as well as the equitable jurisdiction of the federal courts and the right to injunctive relief have been upheld often under similar circumstances. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Carter* v. *Carter Coal Co.*, 298 U.S. [fol. 42] 238 (1936); *Public Utilities Comm'n of California* v. *United States*, 355 U.S. 534 (1958); *Adler* v. *Board of Education*, 342 U.S. 485 (1952); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Currin* v. *Wallace*, 306 U.S. 1 (1939); *Terrace* v. *Thompson*, 263 U.S. 197 (1923); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). It is our considered opinion that these decisions are controlling upon the present case and that defendants' motion to dismiss the complaint therefore should be overruled.

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THE MERITS

Having negotiated the procedural hurdles, we proceed to an examination of title II of the Civil Rights Act of 1964:

> Section 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation

on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title *if its operations affect commerce*, or if discrimination or segregation by it is supported by State action: . . .

. . . .

(2) *any restaurant*, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

. . . .

(c) *The operations of an establishment affect commerce within the meaning of this title if* . . . . (2) *in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves*, or gasoline or other products which it sells, *has moved in commerce* . . . .

(Emphasis supplied.)

Contending that the foregoing portions of the act, as applied to the local business which they operate, are [fol. 43] unconstitutional, plaintiffs insist that when private establishments within the confines of the respective states, in the lawful and legitimate exercise of their private discretion, wish to select their customers there is no power, under the Constitution, or any of its amendments, granted to the federal government to regulate such private accommodations.

The heart of the federal compact beats in the tenth amendment of the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus it is to the Constitution and its amendments that we must look to determine

whether Congress possesses the power it has in this instance sought to exercise.

Insofar as we can determine from a review of the legislative history of the act[5] and the extensive debates in the Senate relevant to title II,[6] the only three suggested sources of congressional power were the thirteenth amendment, the fourteenth amendment, and the commerce clause.

At oral argument counsel for defendants forthrightly stated their opinion that the thirteenth amendment was neither authority for nor prohibitory of this legislation. We agree, thereby rejecting the argument of plaintiffs that the effect of such act is to impose upon them a con- [fol. 44] dition of involuntary servitude in violation of such amendment.[7]

It cannot be successfully contended that the above quoted portions of the act may be constitutionally applied to these plaintiffs under the grant of legislative power contained in the fourteenth amendment since it was conceded at oral argument that the State of Alabama, in none of its manifestations, has been involved in the private conduct of plaintiffs in refusing to serve food to Negroes for consumption on the premises. *Civil Rights Cases*, 109 U.S. 3 (1883); *Peterson* v. *Greenville*, 373 U.S. 244 (1963).

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[5] 11 U.S. Code Cong. & Ad. News 1727-1891, 88th Cong., 2d Sess. (July 20, 1964).

[6] V Cong. Rec. 4757, 4593-4598, 4643-4655, 4680-4681, 4833-4835, 4906, 5066-5072, 5091-5104; VI Cong. Rec. 5454-5458, 5539-5543, 5690-5693, 5770-5771, 5851-5855, 5865-5871, 5879-5889, 6003, 6212-6214, 6234-6240; VII Cong. Rec. 6307, 6334-6341, 7039-7041; VIII Cong. Rec. 7552-7558, 7677-7684, 7816-7825, 7837-7854, 7966-7967, 8029, 8092, 8371, 8805-8806; IX Cong. Rec. 8849; (1964).

[7] *Compare*: Butler v. Perry, 240 U.S. 328 (1916); Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); State v. Sprague, 32 U.S.L. Week 2610 (New Hampshire Sup. Ct. 1964); Scheiber, *The Thirteenth Amendment and Freedom of Choice in Personal Service Occupations: A Reappraisal*, 49 Cornell L.Q. 508 (1964).

[8] Section 5 thereof reads as follows: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

In any discussion of the commerce clause as a grant of power to the national government to regulate activities commonly described as private and local we keep in mind the admitted fact that a majority of sincere and conscientious members of Congress believed this legislation to be in the national interest and necessary to end practices which they considered debasing to human dignity. Of course, we express no opinion as to the wisdom of the legislation and confine our consideration to the constitutionality of the provisions with which we are concerned.

The commerce clause, appearing in article 1, section 8 of the Constitution, reads as follows:

> "The Congress shall have Power . . . .
>
> . . . .
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> . . . .
>
> . . .—And to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."

[fol. 45] The language is simple and unadorned. It has remained unchanged since 1789. With reference to it, to allay popular misgivings as to the nature and extent of powers vested in the Union by the new Constitution, James Madison wrote, "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."[9] And Alexander Hamilton made it clear that the commerce clause was intended to restrain the "interfering and unneighborly regulations of some states."[10] In spite of its simplicity and clarity and because of the constantly increasing "interpenetrations of modern society,"[11] it has spawned thousands of cases.

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[9] The Federalist No. 45 (Madison).

[10] The Federalist No. 22 (Hamilton).

[11] Polish Alliance v. Labor Board, 322 U.S. 643, 650 (1944).

In *Civil Rights Cases*, 109 U.S. 3 (1883), at page 10, Mr. Justice Bradley characterized section 1 of the Civil Rights Act of 1875: "Its effect is to declare, that in all inns, public conveyances and places of amusement, colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa*." Thereafter, he posed and answered a question: "Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments [thirteenth, fourteenth and fifteenth]." Since the commerce clause had been in [fol. 46] the Constitution for almost one hundred years and since we are advised that the Solicitor General in brief had urged upon the court the sufficiency of its grant of power to sustain the challenged legislation, Mr. Justice Bradley's pronouncement is, to say the least, highly intriguing and might be accorded more than persuasive authority but for the subsequent statement in *Butts* v. *Merchants Transp'n Co.*, 230 U.S. 126 (1913), at page 132:

> "The question of the constitutional validity of those sections came before this court in *Civil Rights Cases*, 109 U.S. 3, and upon full consideration it was held (a) that they received no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and by their terms, they were not enacted in the exertion of that power . . . ."

While we shall not attempt the impossible task of a precise delineation of the contours of the power to regulate interstate commerce granted the Congress or the Herculean labor of analyzing the multitudinous cases dealing with various aspects of what may be termed primary and implied power, we shall make an effort to distill from the decided cases a definitive statement of such power which may be applied to this case only.

Some presuppositions are permissible; indeed they are required by the teaching of *Wickard* v. *Filburn*, 317 U.S.

111, 120, "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. Gibbons v. Ogden, 9 Wheat. 1, 194-195."; of *Swift* v. *United States*, 196 U.S. 375, 398, ". . . commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."; of *The Pipe Line Cases*, 234 U.S. 548, 560-61, "The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution . . . ."; and, of *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 30, "The authority of the federal government may not be pushed to [fol. 47] such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

Proceeding to explicate our understanding of the nature and extent of the power with which we are concerned, it is quite unnecessary to labor the obvious, that the commerce clause constitutes an express grant of power to Congress to regulate interstate commerce, which consists of the movement of persons, goods or information from one state to another. The cases are legion sustaining its exercise in this area.[12] Its power is not restricted, however, to the regulation of interstate commerce. Congress is further invested with the power to regulate intrastate activities, but only to the extent that action on its part is necessary or appropriate to the effective execution of its expressly granted power to regulate interstate commerce.

The power of Congress to regulate wholly intrastate activities is brought into play only when those activities have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from practices within a state which

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[12] *E.g.* United States v. International Boxing Club, 348 U.S. 236 (1955); United States v. Shubert, 348 U.S. 222 (1955); Radovich v. National Football League, 352 U.S. 445, 455 (1957); United States v. Frankford Distilleries, 324 U.S. 293 (1945).

burden its freedom or obstruct its flow.[13] The exercise of such power must necessarily be prospective, for the [fol. 48] reason that, unlike Tennyson's brook, interstate commerce does not run on forever. At some time it must come to an end within the boundaries of some state.[14]

This century has witnessed a dynamic expansion of federal control not only of the movements of commerce between the states but also of intrastate activities which have been found to burden its freedom or obstruct its flow. Thus Congress has exercised its power granted by the commerce clause to enact the Robinson-Patman Act,[15] the Federal Food, Drug and Cosmetic Act,[16] the White Slave Laws,[17] the Gambling Devices Transportation Act,[18] the Agricultural Adjustment Act of 1938,[19] the Fair Labor Standards Act,[20] and the National Labor Relations Act,[21] among others.

Concededly, the latter three, in broad extension of federal control, have immediate, direct and practical impacts upon activities which were at one time considered wholly

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[13] United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947); Santa Cruz Co. v. NLRB, 303 U.S. 453 (1938); Labor Board v. Jones & Laughlin, 301 U.S. 1 (1937); Edison Co. v. Labor Board, 305 U.S. 197 (1938); Labor Board v. Fainblatt, 306 U.S. 601 (1939); United States v. Darby, 312 U.S. 100 (1941).

[14] Gibbons v. Ogden, 9 Wheat. 1 (1824); Schecter Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Welton v. Missouri, 91 U.S. 275 (1875); Bowman v. Chicago & N. Ry. 125 U.S. 465 (1888); Packer Corporation v. Utah, 285 U.S. 105 (1932); Florida v. United States, 282 U.S. 194 (1931); Yonkers v. United States, 320 U.S. 685 (1944); Palmer v. Massachuetts, 308 U.S. 79 (1939).

[15] 52 Stat. 446, 15 U.S.C.A. § 13(c).

[16] 52 Stat. 1040, as amended, 21 U.S.C.A. §§ 301-392.

[17] 36 Stat. 825, as amended, 18 U.S.C.A. §§ 2421-2424.

[18] 64 Stat. 1134, 15 U.S.C.A. §§ 1171-1177.

[19] 52 Stat. 31, as amended, 7 U.S.C.A. §§ 1281-1407.

[20] 52 Stat. 1060, as amended, 29 U.S.C.A. §§ 201-219.

[21] 49 Stat. 449, as amended, 29 U.S.C.A. §§ 151-159.

intrastate in nature thus resting in the domain of state control.

In each instance Congress cautiously made clear legislative findings that the regulation of the intrastate practices dealt with was necessary or appropriate to the effective execution of its expressly granted power to regu- [fol. 49] late interstate commerce. In the National Labor Relations Act such findings are set forth in 29 U.S.C.A. § 151. Moreover, assurance was given that regulation of essentially local matters would apply only where there was an actual effect on interstate commerce by requiring that this be determined administratively or judicially on a record in each individual case. 29 U.S.C.A. §§ 159(c) and 160(a). In the Agricultural Adjustment Act Congress made elaborate findings to establish an effect on commerce of the intrastate activities sought to be regulated. 7 U.S.C.A. §§ 1311; 1321, 1331, 1341, 1351, 1357, 1379(a), and 1380.

The Fair Labor Standards Act contains a built-in limitation on its enforcement by requiring a judicial determination of the ultimate fact that acts of employers or employees actually affect such commerce on a case by case basis.

The Civil Rights Act of 1964 contains no legislative findings and we proceed to a critical examination of its provisions to determine whether it may nevertheless successfully survive the constitutional challenge. It is our opinion that neither of the three above-mentioned acts is an apposite analogy and that the cases arising thereunder afford scant persuasive authority beyond the broad principles enunciated therein.[22]

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[22] That the National Labor Relations Act may not be analogized to the Civil Rights Act of 1964 and that the power of Congress is not plenary with respect to the regulation of activities not themselves interstate commerce is made crystal clear by Mr. Justice Black's concurring opinion in Polish Alliance v. Labor Board, 322 U.S. 643,652:

"The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely 'affecting' such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to

[fol. 50] The duty of this court is classically defined in *United States* v. *Butler*, 297 U.S. at pages 62 and 63:

> "There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. this is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends.
>
> "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to them-

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interstate commerce . . . . In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation . . . . It has insisted upon 'suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.' . . . "

selves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members."

Paraphrased, for clarity of discussion, title II of the act declares that no restaurant may refuse service to any person because of his race, color, religion, or national origin either if it serves or offers to serve interstate travelers or a substantial portion of the food which it serves has moved in commerce.

[fol. 51] No case has been called to our attention, we have found none, which has held that the national government has the power to control the conduct of people on the local level because they may happen to trade sporadically with persons who may be traveling in interstate commerce. To the contrary, see *Williams* v. *Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (8th Cir. 1959); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).

On the authority of the cases collected in footnote 14, *infra*, we believe it to be a settled rule of constitutional law that goods cease to constitute a part of interstate commerce, and become a part of the general property in a state, and amenable to its laws, when they are sent into a state, either for the purpose of sale or in consequence of a sale. The simple truth of the matter is that Congress has sought to put an end to racial discrimination in all restaurants wherever situated regardless of whether there is any demonstrable causal connection between the activity of the particular restaurant against which enforcement of the act is sought and interstate commerce.

If our premise is correct, Congress sought to achieve its end by the sophisticated means of first declaring a restaurant is a place of public accommodation if its operations affect commerce and by thereafter abandoning the "affect commerce" requirement by legislating what is

tantamount to a conclusive presumption that its operations do affect commerce if it is proved either that it serves or offers to serve interstate travelers or that a substantial portion of the food which it serves has at some time, however remote, moved in commerce. The courts will not sustain a presumption when there is [fol. 52] "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot v. United States*, 319 U.S. 463, at 467-468. The issues presented in the instant case require our consideration of only that portion of the statute relating to restaurants which serve food "a substantial portion" of which "has moved in commerce."

If Congress has the naked power to do what it has attempted in title II of this act, there is no facet of human behavior which it may not control by mere legislative ipse dixit that conduct "affect[s] commerce" when in fact it does not do so at all, and rights of the individual to liberty and property are in dire peril.

We conclude that title II of the Civil Rights Act of 1964, as applied to the business operated by these plaintiffs, was beyond the competence of Congress to enact and that its enforcement against plaintiffs under the circumstances of this case would be violative of the fifth amendment of the Constitution of the United States, in pertinent part reading: "No person shall be . . . deprived of . . ., liberty, or property, without due process of law; . . ." Accordingly, they are entitled to the relief for which they pray.

This 17th day of September, 1964.

Walter P. Gewin
CIRCUIT JUDGE

Seybourn H. Lynne
DISTRICT JUDGE

H. H. Grooms
DISTRICT JUDGE

[fol. 52-a]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE McCLUNG, SR. and OLLIE McCLUNG, JR.,
PLAINTIFFS

vs.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States of America; ET AL, DEFENDANTS

ORDER OVERRULING MOTION TO DISMISS—Sept. 17, 1964

In conformity with the per curiam opinion of this court, contemporaneously entered herewith:

IT IS ORDERED, ADJUDGED and DECREED by the court that the motion in behalf of defendants to dismiss the complaint herein be and the same is hereby overruled.

Done, this the 17th day of September, 1964.

WALTER P. GEWIN
Circuit Judge

SEYBOURN H. LYNNE
District Judge

H. H. GROOMS
District Judge

[fol. 53]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE McCLUNG, SR. and OLLIE McCLUNG, JR.,
PLAINTIFFS

vs.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States of America; ET AL., DEFENDANTS

TEMPORARY INJUNCTION—Sept. 17, 1964

In conformity with the per curiam opinion of this court, contemporaneously entered herewith:

It is ORDERED, ADJUDGED and DECREED by the court that the defendant, Nicholas deB. Katzenbach, as Acting Attorney General of the United States of America, and his agents, servants, employees, successors in office and those in concert with him who shall receive notice of this order, be and they are hereby temporarily restrained and enjoined from enforcing the provisions of title II of the Civil Rights Act of 1964 against plaintiffs Ollie McClung, Sr. and Ollie McClung, Jr., as partners operating a restaurant under the trade name "Ollie's Barbecue" at 902 7th Avenue South, in Birmingham, until further order of this court.

Done, this the 17th day of September, 1964.

WALTER P. GEWIN
Circuit Judge

SEYBOURN H. LYNNE
District Judge

H. H. GROOMS
District Judge

[fol. 54]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 64-448

[File Endorsement Omitted]

OLLIE MCCLUNG, SR. and OLLIE MCCLUNG, JR.,
PLAINTIFFS

vs.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States of America; and MACON L. WEAVER, as United States Attorney for the Northern District of Alabama, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Sept. 17, 1964

I

Notice is hereby given that the Attorney General of the United States, and the United States Attorney for the Northern District of Alabama, defendants in the above-entitled case, hereby appeal to the Supreme Court of the United States from the order granting a temporary injunction entered in the case on September 17, 1964.

This appeal is taken pursuant to 28 U. S. C. 1252.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the:

1. Complaint, filed by the plaintiffs on July 31, 1964;

2. Order of Acting Chief Judge of the Fifth Circuit, Richard T. Rives, entered August 4, 1964, designating a District Court of three judges to hear this case, to consist of Circuit Judge Walter P. Gewin, District Judge Seybourn H. Lynne, and District Judge H. Hobart Grooms;

3. Notice by the Clerk of this Court on August 5, 1964, that the motion on the plaintiffs for a temporary injunction had been set down for a hearing on September 1, 1964;

4. Request for Admissions filed by the plaintiffs on August 18, 1964;

5. Motion to Dismiss the Complaint filed on August 19, 1964, by the defendants, and notice that said motion would be brought on for hearing on August 24, 1964;

[fol. 55] 6. Amendment to Complaint, filed by the plaintiffs on August 21, 1964;

7. Request for Additional Admissions, filed by the plaintiffs on August 24, 1964;

8. Response to the Request for Admissions, filed by the plaintiffs on August 24, 1964;

9. Objections to Plaintiffs' Request for Additional Admissions and notice that said objections would be brought on for hearing, filed by the defendants on August 31, 1964.

10. Affidavit of Weaver Saterbak, filed by the plaintiffs on September 1, 1964;

11. Order of the Court granting the plaintiffs' Motion to Amend the Complaint, entered September 1, 1964;

12. Additional response of the defendants to the Request for Admissions, filed September 2, 1964;

13. Opinion and Order entered by the Court on September 17, 1964, denying the defendants' Motion to Dismiss, granting the plaintiffs' request for a temporary injunction and declaring invalid as applied the applicable portions of Title 2 of the Civil Rights Act of 1964;

14. This Notice of Appeal;
15. Transcript of September 1, 1964 hearing on the plaintiffs' Motion for a Preliminary Injunction and the defendant's Motion to Dismiss.

III

The following questions are presented by this appeal:

1. Whether the District Court erred in failing to dismiss the action upon the ground that there was no justiciable controversy;
2. Whether the District Court erred in failing to dismiss the Complaint because a full and complete remedy was available by way of a defense to a proceeding under the Civil Rights Act of 1964;
3. Whether the District Court erred in granting an order restraining the enforcement of the Civil Rights Act of 1964 where the plaintiffs showed no irreparable injury, where the balance of equity clearly favors the defendants, and where the plaintiffs are unlikely to succeed on the merits because Title 2 of the Civil Rights Act of 1964 is constitutional both upon its face and as applied to the plaintiffs.

NICHOLAS deB. KATZENBACH
Acting Attorney General

/s/ Macon L. Weaver
By: MACON L. WEAVER
United States Attorney

[fol. 56]

CERTIFICATE OF SERVICE [Omitted in Printing]

[fol. 57] * * *

[fol. 58]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

Civil Action No. 64-448-S

OLLIE McCLUNG, SR., and OLLIE McCLUNG, JR.,
PLAINTIFFS

vs.

ROBERT F. KENNEDY, AS ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA; MACON L. WEAVER, AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ALABAMA; JOHN DOE AND RUTH ROE, Whose Names Are Otherwise Unknown, but Will be Added By Amendment When Ascertained, DEFENDANTS

Birmingham, Alabama

PROCEEDINGS OF SEPT. 1, 1964

BEFORE:

HONORABLE WALTER P. GEWIN
HONORABLE SEYBOURN H. LYNNE
HONORABLE H. HOBART GROOMS

APPEARANCES:

MESSRS. ROBERT McDAVID SMITH and WILLIAM G. SOMERVILLE, JR., of the firm of Lange, Simpson, Robinson & Somerville, Exchange-Security Bank Building, Birmingham, Alabama, and MR. JAMES H. FAULKNER, of the firm of Bowers, Dixon, Dunn & McDowell, Frank Nelson Building, Birmingham, Alabama, for the plaintiffs.

[fol. 59]

MESSRS. ST. JOHN BARRETT and K. WILLIAM O'CONNER, Department of Justice, Washington 25, D. C., and MR. MACON L. WEAVER, United States District Attorney, Birmingham, Alabama, for the defendants.

[fol. 60] * * *

[fol. 61] PROCEEDINGS

JUDGE GEWIN: Gentlemen, I believe the case is before us on motion to dismiss the complaint. I would like to hear from you.

MR. WEAVER: Your Honor, if I might I would like at this time to introduce Mr. St. John Barrett of Washington, representing the Department, and William O'Conner from Washington.

JUDGE GEWIN: Glad to have you.

MR. SMITH: Before the matter of the motion is dealt with in argument we would like to present the Court with a memorandum brief on these points we have filed since we received the brief of the Government, and if I could approach the Court I would like to present it at this time.

JUDGE GEWIN: All right. The jurisdictional question now has been eliminated. The question of service—

MR. BARRETT: Your Honor, we don't urge that.

JUDGE GEWIN: Well, it comes down to the question of consideration of the motion to dismiss, I take it.

MR. SMITH: Your Honor, there is another matter at this time we would like to call your attention to. We [fol. 62] have an affidavit we would like to file at this time as—in support of the Bill of Complaint. We expect to offer live witnesses as the trial proceeds but it

is, of course, appropriate to support a complaint for preliminary injunction with an affidavit. The matters covered in this affidavit relate to the purchase of meat by the plaintiff restaurant, the portion of that meat that moves across the State lines. At the time the complaint was prepared and filed this information wasn't known and certainly wasn't known to the plaintiffs. We obtained this from the George A. Hormel Company and I would like to file that as it would bear on this motion.

JUDGE GEWIN: You have any objection to that?

MR. BARRETT: None at all.

JUDGE GEWIN: It will be admitted.

You say you wish to offer evidence, Mr. Smith? We thought it would be appropriate to take the motion along with the case, the motion to dismiss, unless counsel feels strongly like they would like to argue it now.

MR. BARRETT: We have no objection to proceeding that way.

[fol. 63] MR. SMITH: We thought we would like to hear argument on the motion but that is entirely satisfactory.

There is one other matter we would like to bring to the Court's attention. Sometime ago the plaintiffs in this case filed a Request for Admissions on the defendants. The response to that request was received approximately twelve days ago. I believe it may be shown in the file the Court has. After receiving the first response the plaintiffs filed additional Requests for Admissions, continuation of the admissions asked for previously and touching upon matters that were brought to focus by the answers given in the first request. This morning we received from the defendants objections to those additional Requests for Admissions. No objection on the ground they are additional but they have been received and we assume they are before the Court.

We would like to address ourselves briefly to that matter. We believe that it will simplify the proceedings here and also shorten the record if we can have the admissions. These are the objections of the defendants and perhaps they would like to address themselves to [fol. 64] them. I would like the Court to consider them at this time before we start putting evidence on.

JUDGE GEWIN: All right, would you like to support your objections to the requests?

MR. BARRETT: Yes. Would it help the Court if I read the admissions?

JUDGE GEWIN: Very definitely.

MR. BARRETT: The prior admissions, Requests for Admissions to which we did respond and raised no objection related to the respective position of the defendants, Kennedy and Weaver. We have admitted that and the responsibility generally to enforce the Civil Rights Act which we conceded. And we pointed out it is defined by Statute. And we conceded, although I think it was purely a question of law rather than fact, that this Court is the proper forum to dispose of whatever issue is raised by the complaint.

With respect to whether or not the restaurant here involved is within the terms of the Statute, we answer we were unable to admit or deny that for lack of information regarding the operations of the restaurant. In any event it didn't—our position on the legal issue [fol. 65] here is already stated in our legal memorandum.

The additional Request for Admissions, the first one which is No. 7, is as follows: "That while testifying before the Committee on the Judiciary of the United States Senate, in connection with proposed legislation identified as S1731, Defendant Kennedy made the following statements and answers on Wednesday, July 31, 1963: 'Attorney General Kennedy: Well, I think if he ran a restaurant, Senator, he would be covered under Paragraph 3(ii), so I don't think it would be very difficult. Subsection 3(ii) covers establishments where a substantial portion of any goods held out to the public by any such place or establishment for sale, use, rent, or hire, has moved in interstate commerce. What we intend to cover are hotels, motels, department stores, restaurants, variety stores and similar places.'"

Then another question and, "Attorney General Kennedy: I would say, Senator, that you could tell him that generally if he runs an eating establishment that he has an effect on interstate commerce, and that he would be covered. So I don't see that there is a problem for

him if that is the great difficulty as to whether he is or [fol. 66] is not covered. I would think that restaurants generally would be covered under this bill."

We object to this on the ground it doesn't call for any admission of an evidentiary nature nor for any information that can lead to discovery of evidence. It is merely a question as to whether the records of the hearing before the Congressional Committee are accurate. We will concede their accuracy but—if that will serve the plaintiff, but as to whether or not these particular things were said we think are completely divorced from any question of fact that can be disputed before this Court.

JUDGE LYNNE: Mr. Barrett.

MR. BARRETT: Yes, Judge Lynne.

JUDGE LYNNE: Wouldn't—if it became necessary to examine the legislative history, wouldn't the Court be permitted to take judicial notice of any official records of the—

MR. BARRETT: Oh, yes, indeed. I think the Court can rely on the records of the hearings. I think it is inappropriate and that is our objection to make of this sort of thing a Request for Admission. They might as [fol. 67] well ask us whether Cooley's Volume on Constitutional Law contains a particular sentence. We can look at it and the Court can look at it and it is really an anticipatory argument rather than a real Request for Admission. We don't mean to quibble about the form but we have already answered admissions and we are reluctant to continue responses to this sort of thing.

JUDGE LYNNE: Mr. Smith, with that concession do you insist on that Request for Admission?

MR. SMITH: Your Honor, as I understand the concession, I think we can move along. As I understand it, they say the entire legislative history, including the entire argument referred to here in the hearings before the Senate Judiciary Committee would be considered before the Court.

We have the right to refer to it in brief or to this Court or have the right to call it to the attention of any Court, is that the position?

MR. BARRETT: Yes, sir.

MR. SMITH: However, I don't agree that this is not evidentiary. This is a defendant in the case who made a statement in his official capacity testifying before a [fol. 68] Committee of the United States Senate, and I think what he said is very important from an evidentiary standpoint because one of the very points we are dealing with is his intentions of enforcing the Civil Rights Act and he has equivocated in whatever response we have received up to now. So we think these things are important evidence in view of his equivocation and whether he intends to enforce it or not.

JUDGE GEWIN: Whether law or fact you both agree we can look at it?

MR. SMITH: Yes, sir.

JUDGE GEWIN: Well, I think we will sustain the objection with that understanding.

MR. SMITH: All right, sir.

MR. BARRETT: May it please the Court, Requested Admissions 8, 9 and 10 we consider together. They are essentially the same. They are as follows, "That Defendant Kennedy contends that a restaurant which serves food twenty percent of which has at any time and in any form moved across state lines, is a place of public accommodations under Title II of the Civil Rights Act of 1964."

Then 9 and 10 are exactly the same requests but [fol. 69] changing the amount of food to ten percent in 9 and one percent in the case of 10.

Again our objection is that this is not a request for any admission of fact or for any factual information that could lead to the discovery of evidence. It is clearly a request for the view of the Attorney General on a question of law. It doesn't relate to any evidence even if he could seek a legal opinion from the Attorney General. There hasn't, of course, been any evidence in this case but the views of the Attorney General will be expressed in oral argument and in briefs such as we have submitted and will submit to the Court.

To seek a legal opinion in a Request for Admissions based on a purely hypothetical state of facts to our mind

merely emphasizes the validity of our position that this whole proceeding really does not involve a case of controversy but is merely a legal argumentation in which the plaintiff seeks the views of this Court on an abstract principle of law and in an effort to arrive at that point are seeking to perhaps narrow or limit the position of the Attorney General on purely legal issues.

[fol. 70] For that reason we object to these admissions.

JUDGE GEWIN: Suppose the proof did later show, we will say ten percent, suppose the proof did show ten percent, you think your argument would still be the same?

MR. BARRETT: Well, if Your Honor please, our position would be if it appeared as a matter of fact that say ten percent of the food served by a particular restaurant had moved in interstate commerce, the Attorney General would have to make his decision, as the person responsible for enforcing the Act, whether or not he should seek enforcement with respect to that restaurant. If he decided it was within the Act and that he should seek enforcement he would bring a particular proceeding and that would frame the issues and the Court would then have to determine it.

But to express a view say on all restaurants in the United States as to whether this one is within the Act and that one isn't, upon a request by the proprietors would be merely to enter upon almost the practice of law, at least on this point, and be under an obligation to render legal advice and commit the Department of Justice with respect to particular fact situations which [fol. 71] have not been brought into issue by proper proceedings. So I think we actually should object unless it is framed in an actual case.

MR. SMITH: May it please the Court, I think Mr. Barrett may have gone to another question in part of his answer. What we have asked for here is for them to admit the Attorney General intends that a restaurant which serves food of a certain percentage that has moved across state lines is a place of public accommodation. In this particular request we have not made reference to the enforcement. I don't think the Attorney

General has any discretion of determining what comes under the Act of Congress. The question is whether he contends it comes under the Act. Whether he enforces it or whether he decides to enforce it under Section 206 is not asked in this question.

Certainly this is not hypothetical and certainly this does not ask for a legal opinion. In the brief filed by the Attorney General in this case, which was received by us before asking that question, he cited a case in which interstate commerce was upheld under a Section of the Wage and Hour Law which we say is different, but he cited a case there that held that one-half of one [fol. 72] percent was enough to bring the case within the power of commerce. We haven't gone down to one-half of one percent. We have gone from twenty percent to ten percent to one-half percent.

Now, because the position has been taken in the brief and in the first response to Requests for Admissions, it is incumbent upon us as we see it to establish to this Court's satisfaction that the Attorney General of the United States intends to consider that any restaurant is covered by this Act and is a place of public accommodation, which is the term used in this request, if any of the food it serves has moved in commerce, else why do they cite the case of one-half of one percent.

Now, at some point we have to know his contention in this regard. It isn't hypothetical because we have already presented to Your Honor an affidavit which shows that a portion of the meat served by this plaintiff here that did cross state lines. Now, it is incumbent upon us to show there is a case of controversy on the point they raise. Now, the case of controversy in this instance happens to arise out of the official position of the Defendant Kennedy. I can't think of anything more [fol. 73] relevant than what he contends or what his judgment is as to the application of the Act.

JUDGE LYNNE: Let me ask you this, Bobby.

You think that it is the function of Requests for Admissions to request that an adversary state his legal positions?

MR. SMITH: No, sir, I think you have to consider this in the context of the other requests made. In this

particular instance in view of the position he has taken throughout the legislative history which is very broad and covers many volumes and covers a whole lot of things, it is difficult for us to put before the Court in one single case, and for that reason we felt we were not asking just for a legal opinion but we are asking for the fact which is his contention as to the enforcement of this law and as to the application of this law. Ordinarily, of course, this would involve a legal opinion we couldn't ask the other lawyer for but in this case he is a party. We feel that the legislative history abundantly shows that he does contend that a restaurant that serves food, twenty percent of which has crossed state lines, is cov-
[fol. 74] ered and we expect the legislative history to show that he intended all restaurants to be covered. So, for that reason we thought this was an appropriate request. This comes right down to the question in the case in controversy. The controversy here is does this Act mean to cover every restaurant in the United States if any food, no matter where it came from, has crossed state lines, as sometimes—I believe it was put in his statement before the Senate Committee, "At any time between the ratification of the Constitution and the time he is called on for service".

Now, we believe we need to develop that and that is the reason we ask for it.

JUDGE GEWIN: Then your position is you are not seeking a legal opinion but you are seeking to determine what he contends the law is?

MR. SMITH: That is correct.

JUDGE GROOMS: And whether or not this action can be maintained.

MR. SMITH: Yes, sir, goes directly to the case of controversy.

MR. BARRETT: If Your Honor please, had counsel asked by interrogatory or Request for Admissions wheth-
[fol. 75] er or not the Attorney General was preparing, had prepared or contemplated bringing an action with respect to this restaurant, I would concede—I won't concede that would be a proper request, but it would be a request for a fact which is the state of mind, I sup-

pose, of the Attorney General with respect to his particular client. But when he says that the case for controversy is whether or not the Act extends to all restaurants, he is stating an abstract legal proposition and the fact he is trying with these discovery devices to somehow jell this abstract legal question into the context of something resembling a lawsuit, merely illustrates the essence of what he is doing. Now, it is true that an affidavit has been filed today saying that some of his meat comes from outside of the State of Alabama. But we don't know where the rest of his produce comes from. Whatever the percentage this is to the total we don't know what the true facts are. And the Attorney General has made no effort in connection with the enforcement of this Act to ascertain the true facts or to determine whether or not he should or should not bring a lawsuit.

These plaintiffs are merely seeking to—by asking this [fol. 76] Court to assume injunctive equitable jurisdiction, is seeking to commit this Court to rule on the validity in anticipation of a defense that the restaurant might raise in the future if hereafter the Attorney General should determine to file a lawsuit with respect to this restaurant. File such a suit that would have to be in this very court and he asks that the Court now on purely hypothetical facts pre-commit itself as to what it would do if such a lawsuit was filed.

JUDGE LYNNE: Of course, we are now getting into the factual issue of justicibility.

MR. BARRETT: Yes, sir.

JUDGE LYNNE: The thing about it is this Request for the Admission is parallel with the request in an ordinary personal injury action where the defendant comes in and asks the plaintiff to admit that he contends that the negligence of the defendant consists in this or that or something else which is purely and simply a Request for Admission as to a legal contention.

MR. BARRETT: Oh, yes, indeed, Judge, but we are not suing.

[fol. 77] JUDGE LYNNE: I understand.

MR. BARRETT: We have made no contentions. They are coming in and seeking to create a lawsuit as it were.

JUDGE LYNNE: I am with you on your objection. But I think that they are requesting you to admit a legal contention and I think that is the function of a Request for Admission.

MR. BARRETT: In essence they are trying to make us sue them, either sue them or commit ourselves to say that they are not suable. That is exactly what it seems to me that it boils down to. You just don't frame a case of controversy by making that sort of demand on a Court.

JUDGE GEWIN: We will sustain as to 8, 9 and 10. Sustain the objection.

MR. BARRETT: The admission requested in No. 11 is, "That it is the policy of the Defendant Kennedy in his official capacity as Attorney General of the United States to enforce fully the provisions of Title II of the Civil Rights Act of 1964, against any place of public accommodations which refuses to serve Negroes because of their color."

[fol. 78] We state substantially the same objection to that, it doesn't call for any evidence or information that can lead to evidence but will certainly concede that the duties of the office of the Attorney General requires it incumbent to enforce all of the laws of the United States with respect to which he is given enforcement power as in the case of the Statute.

JUDGE GEWIN: The basis of this request may have been generated by some case in Connecticutt involving contraceptives where one Court said that there was no policy of enforcement anyway. It was strictly a question of policy of enforcement.

MR. BARRETT: If the plaintiffs are fearful or wonder whether the Attorney General is going to desist from performing what appears to be his duty under the Act because in his view the Act is patently unconstitutional, certainly I can relieve them of that fear.

JUDGE GROOMS: Is it your contention that the Attorney General will enforce the law?

MR. BARRETT: Yes, it is.

MR. SMITH: May I be heard briefly on that?

JUDGE GEWIN: Yes, sir.

[fol. 79] MR. SMITH: The only objection to this is that it is irrelevant and cannot lead to a discovery of any relevant evidence. That is the only objection taken to this particular request. We can't think of any more relevant evidence in this case where they have said there is no case of controversy than whether is the policy of the Attorney General to enforce this law on the facts set out in this request. May we call the Court's attention to the fact that Section 206 of the Act says that where a pattern or policy of exclusion has been found, that the Attorney General may proceed in the District Courts of the United States to enforce the law.

Now, with respect to this particular defendant, Attorney General Kennedy, we think it is important that his office has the policy of enforcing it under these circumstances. We can't think of anything more relevant.

JUDGE GEWIN: We will require an answer to eleven.

MR. SMITH: All right, sir.

JUDGE GEWIN: Unless someone has a better light to give us.

MR. BARRETT: I think in essence what I have said [fol. 80] answers it and I would be glad to reduce it to a written answer.

The next objection to the next Request for Admission which is No. 12 reads, "That the averments of the complaint in this action are sufficient to cause Defendant Kennedy, as Attorney General of the United States, to have reasonable cause to believe that the plaintiffs are engaged in a pattern or practice of resistance to the full enjoyment of some of the rights purportedly secured by Title II of that Act, and that such pattern or practice is of such a nature and is intended to deny the full exercise of said rights and that it is the policy of Defendant Kennedy as Attorney General of the United States, under such circumstances, to use the power given him under Section 206 of said Act to compel compliance by plaintiffs with the provisions of the Act."

Now, again this is simply a request for the views of the Attorney General as to the suability of the plaintiffs upon the stated facts stated in the complaint. In look-

ing at it another way, it is a request for our opinion, I suppose, as to the sufficiency of their complaint. This is purely a legal question that will have to be argued [fol. 81] to and decided by the Court but not the sort of thing that can be sought through admissions of fact.

JUDGE GEWIN: Mr. Smith.

MR. SMITH: May it please the Court, the averments of the complaint show that the plaintiffs in this case have declined to serve Negroes that applied to be served. It shows—the affidavit in support filed today, and even before that, shows substantially a portion of the food purchased and sold by them, served by the plaintiffs, moved in commerce across state lines. On those facts I am unable to see what part of this Mr. Barrett contends is asking for an opinion. We say that we have refused service and we say that a substantial portion of the food served crossed state lines. Now, if it is the policy of the Department to enforce the law under those circumstances, I can't see that we are asking for anything hypothetical.

JUDGE GEWIN: We will sustain as to No. 12.

MR. BARRETT: The 13th Request for Admissions reads, "That Defendant Kennedy personally sponsored and encouraged the passage of the Civil Rights Act of 1964, and intends in his official capacity fully to carry [fol. 82] out its provisions against all places of public accommodation which do not voluntarily comply with the provisions of Title II of the said Act."

As to the latter clause of that request I think we have already dealt with it. As to whether Mr. Kennedy personally sponsored and encouraged passage of the Act, I think the legislative history shows that he was instrumental in urging its adoption and hammering out the terms of the Statute itself. He many times expressed the importance of its enactment and compliance with its terms but we do object to the Request for Admission. It isn't asking, in our judgment, for anything of an evidentiary nature.

MR. SMITH: I think the point raised there has been argued by both sides and we don't care to argue that particular point.

JUDGE GEWIN: Sustain as to thirteen.

MR. BARRETT: The 14th Request for Admission reads, "That assuming that a substantial portion of the food served by the plaintiffs' restaurant has moved in interstate commerce, Defendant Kennedy as Attorney General of the United States will, unless enjoined by this Court, enforce or attempt to enforce said Act [fol. 83] against the plaintiffs or their restaurant."

Again we object on the ground it doesn't call for any evidence but asks for a legal conclusion based on a hypothetical set of facts. It says, "Assuming a substantial portion". Well, even if that assumption was somehow permissible, there are other facts that go into the determination whether or not the Attorney General brings a lawsuit. One is the national interest and the other is whether or not there is a pattern and practice of discrimination as distinguished as to whether or not a particular individual was turned away by reason of his race. The individual can bring a lawsuit under the Act but if the Attorney General is to bring the lawsuit there must be the added determination by him that there was a pattern or practice of discrimination and that it is in the national interest.

MR. SMITH: May it please the Court, it seems to me as indicated by his objection that his answer to that would be no. If that is his answer, he can make his answer now. It says assuming that a substantial portion of the food served in the restaurant moved in interstate commerce, if you assume that he says he still can't [fol. 84] say whether he will enforce the law or not, then I think we are entitled to that as a response. I think it is extremely important. I don't know what these other factors we have been talking about are. We have alleged he will enforce it and this is a question to him, "Will you enforce it?"

JUDGE GEWIN: We will sustain as to fourteen.

MR. BARRETT: The 15th Request for Admission is, "That Defendants have the opinion that Title II of the Civil Rights Act of 1964, insofar as it relates to restaurants, is a valid exercise of the powers given Congress under the Constitution of the United States."

We make the same technical objection to that, that we have already fully, I think, responded to in our briefs and that is the proper place. It is purely a legal question.

JUDGE GEWIN: Sustain.

MR. SMITH: May I address myself to that?

JUDGE GEWIN: Oh, excuse me.

MR. SMITH: Of course, we have alleged in the complaint that one of the justicible issues in this case is that we say the Act is unconstitutional when applied to these plaintiffs or their restaurant and we deal with the [fol. 85] question whether or not they have differing views and we are frank to say that we have always asserted that they have differing views—

JUDGE GEWIN: As indicated by the papers they filed.

MR. SMITH: I would think so and I don't think the briefs fully take advantage of it but we make no further point of it because we assume, according to our stipulation, that the entire legislative history will be available and we call the Court's attention to the places where they argue that.

JUDGE GWIN: That is all of them, I believe.

MR. SMITH: Yes, sir. May we have the answer to No. 11?

JUDGE LYNNE: the answer has been orally stated and will be later reduced to writing. The reporter has it, I believe.

MR. SMITH: It is the policy to enforce that Act?

JUDGE LYNNE: Yes, sir.

MR. SMITH: Can we stipulate that will be the answer that will be filed in writing later, Mr. Barrett?

MR. BARRETT: Yes, sir.

MR. SMITH: May we proceed?

[fol. 86] JUDGE GEWIN: Yes, sir.

MR. SMITH: I don't know whether this Court cares for an opening statement but I would be glad to go ahead with the evidence or whatever procedure the Court—

JUDGE GEWIN: We are ready for the evidence.

MR. SMITH: Mr. McClung, Sr.

OLLIE McCLUNG, SR.,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. SMITH:) Mr. McClung, I am going to ask you to answer all of these questions so that someone standing over by the door can hear you. You will have to speak out because the reporter can't take down a nod of your head.

This is Mr. Ollie McClung, Sr.?

A Yes, sir.

Q Where do you live?

A 5 Woodhill Road, Mountain Brook.

Q Jefferson County?

A Yes, sir.

[fol. 87] Q Where do you have your restaurant?

A 902 - Seventh Avenue, South, Birmingham.

Q How long have you been at that location?

A My father started in business in 1926.

Q And tell us how the business has been handled within the family since that time.

A Well, my father operated it until 1937 at which time I became a junior partner with him. He died in 1941 and at that time I became the proprietor and operated it myself until 1958, when my son, Ollie, Jr., became a junior partner with me in the business.

Q Which he is today?

A Yes, sir.

Q A junior partner today?

A Yes, sir.

Q The business has been in your family since 1926?

A Yes, sir.

Q Has it been at the same location all the time?

A It started on Sixth Avenue, South, and Goldwire Street in 1926 and moved July 1927 to the present location.

Q And you have been in the same location since that time?

[fol. 88] A Yes, sir.

Q Tell the Court if you will, please, sir, something about the location and character of the neighborhood in which your restaurant is located?

A The principal location is in the colored residential and light industry section of Birmingham. We have several colored schools, several colored churches, and one backs up to my property, a large colored church. All of the residential section is colored.

Q And any residential property in that immediate area is colored property, is that right?

A Yes, sir.

Q What is on the east side of your property?

A The east side is colored residential homes.

Q And on the west side ?

A The west side is light industrial, Daniel's Construction Company, Standard Oil Company, and those businesses.

Q I believe Ingall Iron Works is two or three blocks away?

A Yes, sir.

Q Now, you say there are schools in the immediate [fol. 89] neighborhood?

A Yes, sir, within several blocks of my place.

Q White or colored?

A Colored schools.

Q Now, how far is your restaurant from the nearest interstate highway?

A Eleven blocks.

Q And your restaurant is on Seventh—

A Ninth Street.

Q Ninth Street, and the nearest interstate highway is on 20th Street?

A Yes, sir.

Q I believe there as a State of Alabama Highway that goes by your restaurant, and where does that end?

A I believe it begins at 20th Street and Sixth Avenue, South, or Seventh Avenue, South, and goes to the 31 Highway.

Q Goes to 31 Highway?

A Yes, sir.

Q What is the number of that road?
A 149.
Q And that is not ar interstate road at all, is it?
A I don't believe it goes out of the county.
[fol. 90] Q It stays in Jefferson County entirely?
A Yes, sir.
Q It isn't an alternate interstate?
A No, sir.
Q How far is the nearest railroad station from your place of business?
A About eighteen or twenty blocks.
Q That would be the—
A The L & N Station.
Q How far is the nearest bus station?
A Some four more blocks. Twenty-two blocks. Fourth Avenue and 19th Street.
Q How far is the nearest airport from your place of business?
A Six or eight miles or maybe further.
Q In other words, on the other side of Birmingham?
A Yes, sir, completely across town.
Q Tell us, if you will, something about the nature of your restaurant business, what kind of food you serve and the type of service provided, and something about the parking area if there is any.
A The type of food we serve is barbecue and homemade pies and beverages, non-alcoholic beverages, would [fol. 91] account for ninety percent of our sales or ninety-five percent of our sales.
Q Barbecue, homemade pies, and beverages, non-alcoholic beverages would cover ninety-five percent of your business?
A Yes, sir.
Q Do you serve alcoholic beverages at all?
A No, sir.
Q What is the type of trade to which you cater?
A We cater entirely to business people and family trade.
Q Have you in the almost forty years you have been in business there, have you at any time served Negroes?
A No, sir. Not on the premises.

Q Do you—have you had the practice of selling them food to be taken away from the premises?

A Yes, sir, we continue to serve them take-out food.

Q Now, how many people will your restaurant seat?

A Approximately 220 full capacity.

Q That is if every table has all the people it will take you can seat about 220?

A Yes, sir.

Q Do the majority of the people that come to your [fol. 92] restaurant walk there or come by automobile?

A The large majority by automobile.

Q How many parking spaces does your property afford?

A On my property 92 places besides the street and other parking around.

Q You can have at least one hundred automobiles there?

A More than that, yes, sir.

Q Do you work there yourself?

A Yes, sir.

Q What do you do at the restaurant?

A I do all types of work there at different times. Do cooking of the meat, wait on customers, and cashier on occasion.

Q You prepare the food?

A Yes, sir.

Q And serve the food?

A Yes, sir.

Q You know a great many of your customers personally?

A A great majority of them, yes, sir.

Q You would know them by name or by face?

A By face mostly.

Q What advertising, if any, has your business done [fol. 93] in the time it has been in business?

A We have no advertising program at all. We do no advertising.

Q Do no advertising?

A No, sir.

Q You have any signs out on the highway or out in any public place?

A No signs anywhere off of our property right there.
Q The only sign you have is on your property?
A Yes, sir.
Q You ever run ads in the newspapers?
A No, sir.
Q Have you ever placed signs in hotel or motel rooms?
A No, sir.
Q Have you in running your restaurant, has any effort been made to attract transient people or travelers?
A No, sir.
Q In your judgment, have you attracted any transient people or travelers?
A Not to my knowledge, sir.
Q About what is the total gross sales of your busi-
[fol. 94] ness annually?
A This past year around $350,000.
Q By the past year, what do you mean?
A The past calendar year.
Q Beginning when?
A January 1, 1963, through December 31, 1963.
Q The calendar year of 1963?
A Yes, sir.
Q You did about $350,000 worth of gross sales?
A Yes, sir.
Q And approximately how many meals is that?
A Over half a million. Over 500,000. 536,000, I believe.
Q You have the records in court here showing the figures on your business?
A Yes, sir, I have them over there (indicating).
Q Mr. McClung, do you attract the type of trade that comes in once a month or twice a month or do many of your people come in daily or frequently?
A The majority of my customers come in daily.
Q So of that 536,000 meals you probably serve a whole lot less people than that.
A Oh, very much so.
[fol. 95] Q Substantially less than that?
A A very substantial amount less than that.

Q What was the total amount spent by your restaurant in the twelve months that ended July 1st of this year, that is July 1, 1963, through July 1, 1964, approximately how much food was purchased by that restaurant?

A Approximately $150,000 worth.

Q Where was that food bought?

A It was all bought from local houses, meat houses and grocery houses and paper goods.

Q and, of course, that doesn't include any labor or overhead?

A No, sir, food purchases.

Q An affidavit has been filed today that shows you purchased from George A. Hormel Company, I believe, $69,783.00 worth of meat, is that correct?

A Yes, sir.

Q Of course, you, of your own knowledge, have no way of knowing where that meat comes from?

A No, sir.

Q Is that the principal source of your meat purchases?

A I buy the large majority of my meat there, yes, sir, [fol. 96] eighty or ninety percent.

Q That represents eighty or ninety percent of your meat purchases?

A Yes, sir.

Q I take it then meat is by far the majority of your purchases?

A I believe about eighty-five thousand of the one hundred and fifty thousand is meat.

Q In other words, that is getting up to about—

A About fifty-five percent.

Q About fifty-five percent of your total purchases is meat, and eighty-five percent of that has been purchased from Hormel Company?

A I would think so, yes, sir.

Q Where do you place your order for that meat?

A The salesman works me directly. I give the local salesman the order for the meat.

Q The local salesman comes to your place of business?

A Yes, sir.

Q And you give him the order?

A Yes, sir.
Q Where are you billed?
A I am billed from the Birmingham office of Hormel
[fol. 97] & Company.
Q Where do you pay?
A I pay the local salesman.
Q Cash?
A No, by check.
Q But you pay him personally?
A Yes, sir.
Q Where is the meat delivered to you from?
A From the local Hormel office.
Q This meat, is there anything about this meat that is unusual as related to your restaurant?
A No, all standard cuts.
Q Standard barbecue cuts?
A Yes, sir.
Q Mr. McClung, I believe you have got the figures. Tell the Court what was your daily average gross sales last year. Have you computed that?
A I have them down but I believe $1,035.00 or something of that nature.
Q Have you determined from your books by taking your expenses and your costs, what would be your break-even point in daily sales?
A I believe it was $970.00. I can give you the exact
[fol. 98] figures if you want them.
Q I think we should have them.
I would like the record to show that Mr. McClung now has his account book with him.
A The average sales per day, 1963, $1,139.00. Average costs per day for all expenditures, $939.00, which doesn't include any compensation for the partners.
Q If your daily sales were reduced by $200.00, you would be at the break-even point approximately?
A Yes, sir.
Q And if it was reduced $300.00, you would lose approximately $100.00 a day?
A Yes, sir.
Q Were you aware of the adoption of the Civil Rights Act of 1964 when it was signed by the President?

A I was aware of it. I wasn't informed by anyone other than just common knowledge.

Q You picked it up by the radio or television?

A Yes, sir, and the restaurant association.

Q Did you at any time after that—I believe it went into effect on July 2nd. At any time after that did you have any Negroes come to your restaurant and apply for service?

A Yes, sir.

[fol. 99] Q Approximately when was that?

A July 3rd.

Q How many came?

A Two came and when we refused them they left and came back with four more. Six total.

Q Young or old?

A They were young, two of them particularly.

Q And the other four were middle-aged?

A My son handled the situation there. I wasn't there at that time and he can give you the exact details.

Q You were not there?

A No, sir.

Q At any time since then have you been present when any Negro people came in seeking service?

A Yes, sir.

Q When was that?

A Some three or four weeks ago.

Q Since this suit was filed?

A I don't know.

Q The suit was filed on the 31st, I believe, of July?

A Yes, since the suit was filed we have had several [fol. 100] occasions.

Q Have you declined to serve them?

A We have declined to serve them, sir. Serve on the premises. We offered to serve them take-out service and when they refused that we declined service.

Q Were they declined service because they were Negroes?

A Yes, sir, I would think so. Because we chose not to serve them.

Q Let me go back just a minute and ask you to tell the Court, please, the approximate amount of your investment in that business out there in dollars?

A At my cost or today's market value?
Q Better stick to your cost.
A We have something over $200,000 in actual cost invested.
Q Do you have the annual net profits after paying salaries and so forth?
A Yes, sir, I think so.
Q What is that?
A For the past calendar year?
Q Yes.
A The profits before the partners' compensation was [fol. 101] around fifty or $55,000.
Q Without any compensation for you and your son?
A Yes, sir, and after compensation to the partners something over $30,000 was left for distribution.
Q Based on that do you have any judgment as to the value of your business as a going concern?
A Sir, I wouldn't sell it for less than $250,000 or $300,000 for the business itself not counting the property.
Q Do you consider that the value of it?
A In my judgment, it is worth that much, yes, sir.
Q Now, so your restaurant hasn't at any time served Negroes?
A Not on the premises.
Q Are you familiar with restaurants that have, since July 2, of this year, served Negroes?
A Yes, sir.
Q Are you familiar with whether that had any effect on their business?
A Yes, sir, I think so
Q Tell the Court what that effect has been?
A The Britling's downtown has lost 25 percent of their business. Several restaurants in Atlanta I have [fol. 102] heard from have lost a good deal of the business and in Memphis, Tennessee, where I had some direct connection with people, I understand they lost a lot of business when they integrated.
Q Of course, Britling's is downtown Birmingham?
A Yes, sir.
Q You are referring to downtown restaurants?
A Yes, sir.

Q Your restaurant is located in an industrial—light industrial and Negro neighborhood, is that right?

A Yes, sir.

Q Do you have any judgment whether your restaurant would be affected more or less or about the same as the downtown cafeterias?

A I would think extremely more.

Q For what reason?

A Because of our location principally with some 1500 or 2,000 high school children passing there everyday.

Q Negro children?

A Yes, sir, and with the churches that are close by and the number of Negro children that are connected with the church, of course. I am assuming it would [fol. 103] damage my business 75 or 80 percent, sir.

Q That would be your judgment?

A Yes, sir.

Q You and your son, part of your duties there is to serve customers the food they eat, that is placed before them?

A Yes, sir.

Q And you take their orders?

A Yes, sir.

Q If you were required to serve Negro customers, would you do so voluntarily?

A No, sir.

Q Is that your own judgment, Mr. McClung, or your own decision?

A Yes, sir, I would refuse to serve a drunken man or a profane man or a colored man or anyone who I felt would damage my business and I run a good, clean place there.

Q By the way, your restaurant isn't open on Sunday?

A No, sir.

Q Open six days a week?

A Yes, sir.

Q Do you have employees there who serve the public [fol. 104] who have indicated they would not voluntarily serve Negroes?

A Yes, sir, I think so.

Q Tell us whether you have or not.

A Yes, sir, they have intimated to me they would not voluntarily serve them.

Q Have you had any that said that?

A Yes, sir.

JUDGE GROOMS: How many employees do you have?

A Thirty-six, sir.

JUDGE GROOMS: White or colored?

A Twenty-six colored and ten white.

Q There have been occasions, Mr. McClung, when you have refused service to people other than colored people?

A Yes, sir.

Q Have you ever called upon the law enforcement officials or the Police Department to eject people from your restaurant?

A Yes, sir, on occasion we have, sir.

Q I am not talking about colored people but white people?

A Yes, sir, even after we served them we have asked [fol. 105] them to leave and not take their money.

Q By the way, you don't serve—you don't serve alcoholic beverages there but do you allow anyone to consume alcoholic beverages?

A No, sir, we do not.

Q Do you serve anyone you have reason to know who has consumed alcoholic beverages?

A No, sir, if we can tell they have been drinking we don't serve them.

Q Have you asked people not to come in?

A Yes, sir.

Q What about people who use profanity in your restaurant, how do you handle that?

A We asked them to leave, sir.

Q You have any other method of dealing with profanity?

A Yes, sir, we have little signs that we put on tables and when that occurs if they do not respect that, then we ask them to leave.

Q Do you have a sign with you?

A Yes, sir, I have one.

MR. SMITH: I don't know it is necessary, may it please the Court, to offer this as an exhibit, but we [fol. 106] would like him to read the sign, what is on it.

A The sign states, "No Profanity, Please. Ladies and Children Are Usually Present. We appreciate Your Cooperation."

Q Mr. McClung, did you reach the decision after July 2 of this year not to serve Negroes as your own independent voluntary decision, or were you influenced by any public officials?

A No, we reached the decision before July 2nd. We reached it several days before on our own. We had no other influence.

Q Is it a fact that most of the restaurants in Birmingham, Alabama have served Negroes since July 2 of this year?

A Yes, sir, I think the large majority.

Q And at any time in your restaurant have you been influenced in any way whatever in making this decision by any state or local official?

A No, sir.

Q Mr. McClung, I believe you said you and your son are partners. Do you actually have a partnership agreement?

A Yes, sir.

[fol. 107] Q In making your determination or decision you would not comply with the Civil Rights Act after July 2nd, did you take into consideration the responsibility to your customers?

A Yes, sir, very definitely.

Q Explain that.

A We consider that we operate our business as a trust to our customers, we are a steward of it, and it is our feeling that they have a place to come in and eat where they will enjoy and where they will leave in a better frame of mind than when they came in, that they will get good food and good service. If we fail to do that we feel like we have failed to fulfill our obligation and we don't deserve their business if we don't give them that kind of atmosphere. And to

do that we feel like it is absolutely essential that we control our clientele.

Q To some extent your restaurant has something of a religious atmosphere?

A Yes, sir, we try to make it so.

Q I don't mean that you have hymn singing but you have signs relating to religion?

A Yes, sir.

[fol. 108] Q Are you in any way connected with a church?

A Yes, sir.

Q What church?

A I am a member of the Cumberland Presbyterian Church; I have been an elder in the church, church treasurer, and Sunday School teacher, and I now teach a Sunday School Class and I have been on the Presbyterial Boards and Synodic Boards and our General Assembly Board and one time I was Moderator of our Church.

Q Over what area?

A Over the entire denomination.

Q The entire denomination of the Presbyterian Church?

A Cumberland Presbyterian Church, yes, sir.

Q Are you sometimes referred to as a lay minister?

A Well, some people call me a lay preacher, yes, sir.

Q I believe I asked you the percentage of the total purchases of food that was meat.

A Yes, sir.

Q The only meat you serve is barbecued meat?

A Yes, sir.

Q By the way, your restaurant is known as Ollie's [fol. 109] Barbecue, is that correct?

A Yes, sir.

Q You told us about $150,000 worth of food was sold or purchased in the past year and you told us that meat represented about 55 percent of that?

A Yes, sir.

Q And about 80 or 85 percent of that meat was bought from Hormel Company. If you will, who did you buy the other meat you purchased from?

A I buy in small amounts from Swift & Company, and Rath Packing Company.

Q I believe both are national companies?

A Yes, sir, they have local houses.

Q You buy from the local house?

A Yes, sir.

Q Now, the other food, from whom do you buy that generally?

A Most of it is groceries from Wood-Fruitticher Grocery Company, and produce from Carlisle Brothers Produce Company.

Q Those are both local companies?

A Yes, sir.

Q And your buns and your bread?

[fol. 110] A From Rutland Baking Company, a local baker.

Q You wouldn't know of your own knowledge the amount of produce that comes in from out of the state, I suppose?

A No, sir.

Q You buy directly from Wood-Fruitticher?

A Yes, sir.

Q Do you receive any food that is delivered directly to you from out-of-state points?

A No, sir.

Q Your food comes to you from local houses that you buy from and tell us whether that is a warehouse.

A No, sir, it is a local distributorship, I suppose.

Q They have a place of business here where they receive—

A It is stored here.

Q That meat is ordered specifically for you?

A No, sir.

Q In other words, they supply your needs from their general supply, is that correct?

A Yes, sir.

MR. SMITH: I believe that is all.

[fol. 111]

CROSS EXAMINATION

Q (BY MR. BARRETT:) Mr. McClung, do you personally supervise the employees who work in your restaurant?

A Yes, sir, I and my son jointly.

Q The two of you give them their direction as to how to carry out the work and what work to do?

A Yes, sir.

Q And you expect them to carry out those directions?

A When they are reasonable, yes, sir.

Q And they do carry out your directions, is that right?

A Not as well as I would like them to but they do, yes, sir.

Q What measures do you take if any employee regularly fails or refuses to carry out your directions?

A We would dismiss them.

Q You have testified that you do not in the restaurant serve intoxicated persons, is that correct?

A That is correct.

Q You do not serve anyone who is disorderly, is that correct?

A That's right.

Q Or anyone who is unclean?

A Well, I don't think I made that statement.

[fol. 112] Q I thought you said something about a clean place.

A I don't recall anything like that.

Q I might have misunderstood you there.

A We have served working men in overalls at times.

Q And you do not serve Negroes?

A No, sir, not on the premises.

Q And you have given directions to your employees with regard to these various standards, who they should serve and should not, is that correct?

A Yes, sir.

Q You do not leave it to the employees, each individual to decide what type of person he should serve or not, is that correct?

A I expect him to determine that to some extent, yes, sir.

Q Under the standards you have laid down, is that correct?

A Yes, sir.

Q Are particular areas in the restaurant assigned to particular employees?

A Yes, sir.

Q So that if a person—a customer sits down at a particular table, a particular employee is expected by [fol. 113] you to serve that person, is that right?

A Yes, sir, that is correct.

Q And if it is a white customer apparently orderly and not intoxicated, you would expect the employee to serve that person, is that correct?

A Yes, sir.

Q And to serve that person in a manner that is fitting and comports with your standards of service to the general public?

A Yes, sir.

Q If an employee consistently fails to do that, you would discharge the employee, is that correct?

A I would think so.

Q How many employees do you have?

A Thirty-six, sir.

Q How many wait the tables?

A About eleven.

Q Eleven wait tables?

A Yes, sir.

Q Are the employees who wait tables men or women?

A All are colored girls except one. I have one white man.

Q With that exception, though, all the table service [fol. 114] is performed by colored women, is that correct?

A Yes, sir.

Q You have mentioned that you sell food to Negroes to eat off of the premises, is that correct?

A Yes, sir.

Q Where does the customer go in the restaurant to purchase food to carry out?

A We have two places for take-out service for white and two for colored take-out service.

Q Where are the places for white take-out service?

A On the counter adjacent to the cashier.
Q Where is the colored take-out?
A At the end of the service counter.
Q Incidentally, do your employees eat on the premises?
A Yes, sir, most of them.
Q White and colored?
A Yes, sir.
Q Where do they eat?
A The colored have their own room they eat in and the white eat in the dining room.
Q Do you have private dining facilities for the general public?
[fol. 115] A No.
Q Do you have more than one dining room?
A I have two rooms adjacent with an opening in between. No enclosure between them.
Q Is the second dining room available for private parties?
A Well, we can serve a group of people but it is never closed off, no, sir. There is no way to close it off.
Q But a person or a group can reserve it?
A Ususally after closing time after 7:30 or 8:00 o'clock after we are through serving the public.
Q Mr. McClung, have you been contacted by any representative of the Federal Government in connection with compliance with the Civil Rights Act?
A No, sir.
MR. BARRETT: I have no further questions.

REDIRECT EXAMINATION

Q (BY MR. SMITH:) I believe you said you had eleven people waiting tables. Do you have facilities at your counter, service counter, for people to sit and eat?
A Yes, sir, we have fourteen counter stools.
[fol. 116] Q Fourteen counter stools. I direct this question direetly to the counter service.
Are those eleven you told us about a moment ago the only ones that serve on the counter?
A Only two of those would serve on the counter.
Q Who else would serve on the counter?

A Whoever is back there. I do sometimes and my son does and different ones back there.

Q The cashier ever serve?

A On occasions.

Q All of that would be additional to those eleven people?

A Yes, sir.

Q The counter service wouldn't be the same people?

A No, sir, except with the exception of two.

MR. SMITH: I believe that's all.

(Witness Excused)

MR. SMITH: We will call Mr. McClung, Jr. at this time.

MR. OLLIE McCLUNG, JR.,

being duly sworn, was examined and testified as follows:

[fol. 117]

DIRECT EXAMINATION

Q (BY MR. SMITH:) Is this Mr. Ollie McClung, Jr.?

A That is correct.

Q You live in Birmingham?

A That is correct.

Q This restaurant that you and your father operate as a partnership, that is in Birmingham?

A Yes, sir.

Q Do you recall the occasion sometime about July 3, 1964, when you were at the restaurant and some colored people came into the restaurant for service?

A Yes, sir, I do.

Q Will you tell the Court about that, please?

A This is during our evening meal, the supper hour, I don't remember the exact time but approximately 6:30 we were relatively busy and two young colored people came in, approximately college age, a girl and a boy. I retract that. A boy came in by himself first. He came up to the counter and told the girl waiting on the counter that night, she asked him what he would like and he would not give her his order but wanted to speak with

the manager, and I was there at the time and she called me over. He asked me would I serve him and I said [fol. 118] if he would step around to the side where the colored take-out counter was the girl would take his order. He seemed actually not to be interested in being served because he never even sat down and he tapped on the counter and asked could he be served here, right at the counter, sit down and eat, and I said, no, that was not our policy and he left.

Approximately forty-five minutes later he came back this time with the young girl that I mentioned and four other colored people, older. They again—they didn't ask anything but rather came in and sat at the counter. Even though it was rather obvious he was aware what the policy was, they came in and sat at the counter and one white young person was sitting at the counter, a boy, and he got up and left the minute they sat down and I went over to them, the girl and boy were obviously part of the professional or paid Civil Rights agitators—

Q You can't tell about that. Anything you saw or heard.

A They had a card and they wanted to know why we did not serve them and this sort of thing, and they filled out the card and wanted to know my name and [fol. 119] address of the place.

Q They were taking notes with pen and pencil?

A Yes, sir, that is correct. And after a couple of minutes I told them that I was sorry that they would have to leave, that it wasn't our policy to serve them there and they got up and left.

Q And there was no threatening on either side?

A That is correct, they got up and left.

Q What has been the behavior and demeanor of your employees since July 2nd? Has it been good bad or indifferent?

A For the most part I can't tell it is greatly changed or different.

Q Has there been any change since this suit was filed?

A Not that I can tell, no, sir.

Q What number of your thirty-six employees are colored people?

A About twenty-five or twenty-six are colored.

Q Have you noticed any change in them at all as a result of this case?

A No, I haven't.

MR. SMITH: I believe that's all.

[fol. 120] MR. BARRETT: No questions.

(Witness Excused).

MR. SMITH: May we have a second, Your Honor? May we call Mr. McClung, Sr. back just a moment?

MR. OLLIE McCLUNG, SR.,

having been previously sworn, was examined and testified further as follows:

REDIRECT EXAMINATION

Q (BY MR. SMITH:) Mr. McClung, the records of this court shows that this suit was filed on July 31, 1964, which I believe was Friday. Is it your recollection this suit was filed on Friday?

A Yes, sir.

Q Did anything occur shortly before that date that in any way influenced your decision in bringing this suit?

A Yes, sir, very definitely.

Q What was that?

A The injunction obtained by the Attorney General against the group of restaurants in Tuscaloosa.

Q I believe the record of the court shows that there has been no injunction but suit was filed.

[fol. 121] A Yes, sir, suit filed by the Justice Department.

Q Do you know what date that was?

A Yes, sir, I think it was Wednesday before this suit was filed the 29th of July.

Q When did you first consult me or Mr. Somerville or Mr. Faulkner in this case?

A As far as filing the suit, the day after that.

Q After the Tuscaloosa case?

A Or that day. Very soon.

Q It wasn't before the Tuscaloosa suit was filed?

A No, sir, I don't believe I talked to you about it before then.

Q You had known me before?

A Yes, sir.

Q Had we ever represented you before?

A No, sir.

Q Either the day of the Tuscaloosa suit or the day after the Tuscaloosa suit was filed?

A Yes, sir.

Q Are you telling the Court the filing of that suit was one of the factors that influenced you to bring this suit?

A It was the important factor, sir, because I felt [fol. 122] like if I were grouped with Howard Johnsons and Holiday Inn and other restaurants of that nature that I would have no opportunity at all to present my case as a local restaurant.

MR. SMITH: That's all I have, you may come down.

MR. BARRETT: No questions.

(Witness Excused)

MR. SMITH: May I ask Your Honor a question that I believe answers itself? I assume that all the records of this court in the Tuscaloosa case are before the Court and the Court take judicial notice of that record. If there is any question about it we would like to offer the records in the Tuscaloosa case.

MR. BARRETT: We object to it as incompetent and irrelevant.

JUDGE LYNNE: It is not necessary to encumber the record. We will take judicial notice of the records.

MR. SMITH: Not only the file but also the averments and pleadings in the case?

JUDGE LYNNE: Yes, sir.

MR. SMITH: Plaintiff rests.

May we make the further comment that this matter [fol. 123] is set today only on the action for permanent injunction, and we, of course, hope on the trial of this case on the merits that we might go into additional matters. We assume the defendants would go into additional matters.

On the application for injunction we rest at this time.

JUDGE LYNNE: You have any evidence?

MR. BARRETT: No, we have no evidence.

JUDGE GEWIN: We will recess until 1:15 at which time we will come back and hear from each side and we will allot one hour for each side.

MR. SMITH: That includes argument on the motion?

JUDGE GEWIN: All argument that you have unless you think you need more time than an hour.

MR. BARRETT: No, sir.

MR. SMITH: I have no way of judging it. We hope to have time to convince the Court we are right.

JUDGE LYNNE: We would like to hear arguments, of course, on the justicibility of the issue presented by the plaintiff in the case.

MR. SMITH: We assume that we would start with our case and—

[fol. 124] JUDGE LYNNE: We have, it seems to me, several things we want to hear about. Whether or not the Act itself, Title II of the Act, the only part we have, whether it is unconstitutional as being beyond the power of the national Congress, in which event I think the issue of justicible issue would be greatly narrowed. I would like to hear from the parties on those issues.

MR. SMITH: Thank you.

(The Court was in recess from 11:30 a.m. until 1:15 p.m.)

JUDGE LYNNE: Gentlemen, does either side desire to have the oral argument recorded by the court reporter?

MR. BARRETT: No, sir.

MR. SMITH: No, sir.

[fol. 125] REPORTER'S CERTIFICATE
[Omitted in Printing]

[fol. 126] CLERK'S CERTIFICATE
[Omitted in Printing]

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 543

NICHOLAS deB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

OLLIE McCLUNG, SR., ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Northern District of Alabama (Appendix A, *infra*) is not yet reported.

JURISDICTION

On September 17, 1964, the three-judge district court declared unconstitutional that part of the Civil Rights Act of 1964 (P.L. 88-352, 78 Stat. 241) which prohibits racial discrimination by any restaurant "if a substantial portion of the food which it serves * * * has moved in commerce" (sections 201(a), (b)(2), (c)(2)), and enjoined the Attorney General and his

745-696—64——1

subordinates from enforcing the Act against appellees' restaurant. A notice of appeal to this Court was filed on September 17, 1964. By order of Mr. Justice Black, dated September 23, 1964, the injunction has been stayed.

The jurisdiction of this Court to review the decision of the district court is conferred by 28 U.S.C. 1252 and 1253.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, sec. 8, cl. 3, and Section 201 of Title II of the Civil Rights Act of 1964 (P.L. 88–352, 78 Stat. 243) are reproduced in Appendix B, *infra*.

QUESTIONS PRESENTED

1. Whether the complaint should be dismissed for want of equity jurisdiction.

2. Whether Title II of the Civil Rights Act of 1964 is constitutional insofar as it prohibits racial discrimination by a restaurant "if * * * a substantial portion of the food which it serves * * * has moved in commerce."

STATEMENT

On July 31, 1964, appellees, who operate a restaurant located in Birmingham, Alabama, filed a complaint

[1] Section 1252 authorizes a direct appeal from an interlocutory or final judgment holding an act of Congress unconstitutional. Section 1253 authorizes an appeal to this Court from an interlocutory or permanent injunction entered by a three-judge court. The decree herein is an interlocutory judgment or injunction, rather than a temporary restraining order; it is not limited to ten days (see F.R. Civ. Proc., Rule 65(b)), but is to continue in effect until further order of the district court.

in the district court challenging the constitutionality of the Civil Rights Act of 1964 insofar as it prohibits racial discrimination or segregation by restaurants. The complaint sought an injunction restraining the Attorney General and his subordinates from enforcing the Act against appellees' establishment. On August 4, 1964, pursuant to 28 U.S.C. 2282, a three-judge district court was designated to hear and determine the case. Appellants moved to dismiss on August 19, 1964, and the case was heard on September 1, 1964. On September 17, 1964, the court denied the Government's motion to dismiss, declared the challenged provisions unconstitutional as applied to appellees' restaurant, and granted appellees' prayer for a preliminary injunction.

The gravamen of the complaint is that appellees' business is "essentially local in character." Appellees alleged that all of their food purchases are made "within the State of Alabama;" that the operation of the restaurant "in no way affects commerce" despite the fact that "some of the food served by [their restaurant] probably originates in some form outside the State of Alabama;" and that the restaurant does not serve interstate travelers. The complaint claimed that, as applied to appellees, the Act was unconstitutional, in that it exceeded the power of Congress to regulate commerce among the several states; deprived appellees of property without due process of law contrary to the Fifth Amendment; subjected them to involuntary servitude prohibited by the Thirteenth Amendment; was "in contravention of natural law;" and violated

the Tenth Amendment. An amendment to the complaint raised the additional objection that the statute contravened appellees' rights guaranteed by the First Amendment. It was further claimed that a genuine threat existed that, unless enjoined and restrained, the Attorney General would seek to enforce the Act against appellants to their irreparable and serious injury, in an amount far in excess of $10,000.

The government's motion to dismiss asserted that no "case or controversy" was presented within the meaning of Article III of the Constitution; that appellees were not threatened with any injury sufficient to justify the exercise of equity jurisdiction; that appellees had an adequate remedy at law by way of a defense to any enforcement proceeding which might be brought against them under Title II of the 1964 Act; and that, in any event, the Act is constitutional.

The holding of the district court that the challenged provision was invalid was premised upon its view that, although a substantial portion of the food served by the restaurant is obtained through interstate channels, it comes to rest before being sold by the restaurant and hence is no longer subject to federal regulation under the Commerce Clause.

THE QUESTIONS ARE SUBSTANTIAL

The issues presented by this appeal are of obvious importance.

The threshold issue is whether equity jurisdiction may be invoked in the absence of enforcement proceedings to draw in question the validity of this

federal statute at the instance of any proprietor who might be covered by its terms, despite the fact that neither criminal prosecution nor money damages are provided for in the Act and there is accordingly no threat of any legal injury.

The second issue is the constitutionality of a statute which has undeniable significance for the Nation and was enacted at "the culmination of one of the most thorough debates in the history of Congress." Mr. Justice Black, opinion denying application for a stay, *Heart of Atlanta Motel* v. *United States,* O.T. 1964, August 10, 1964.

In granting a stay of the district court's injunction entered in the instant case, Mr. Justice Black declared that the issues are "important" and that "their final determination should not be unnecessarily delayed." He also indicated that the Court is prepared to set the case down for argument immediately following the related *Heart of Atlanta* case, which is scheduled to be heard on October 5, 1964. We believe it unnecessary in these circumstances to labor the obvious proposition that the case is one of high importance and merits plenary consideration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

ARCHIBALD COX,
Solicitor General.

OCTOBER 1964.

APPENDIX A

In the United States District Court for the Northern District of Alabama, Southern Division

Civil Action No. 64-448

OLLIE MCCLUNG, SR., AND OLLIE MCCLUNG, JR., PLAINTIFFS

vs.

NICHOLAS DEB. KATZENBACH, AS ACTING ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

In conformity with the per curiam opinion of this court, contemporaneously entered herewith:

It is ORDERED, ADJUDGED and DECREED by the court that the defendant, Nicholas deB. Katzenbach, as Acting Attorney General of the United States of America, and his agents, servants, employees, successors in office and those in concert with him who shall receive notice of this order, be and they are hereby temporarily restrained and enjoined from enforcing the provisions of title II of the Civil Rights Act of 1964 against plaintiffs, Ollie McClung, Sr. and Ollie McClung, Jr., as partners operating a restaurant under the trade name "Ollie's Barbecue" at 902 7th Avenue South, in Birmingham, until further order of this court.

Done, this the 17th day of September 1964.

WALTER P. GEWIN,
Circuit Judge.

SEYBOURN H. LYNNE,
District Judge.

H. H. GROOMS,
District Judge.

[Caption omitted]

In conformity with the per curiam opinion of this court, contemporaneously entered herewith:

It is ORDERED, ADJUDGED and DECREED by the court that the motion in behalf of defendants to dismiss the complaint herein be and the same is hereby overruled.

Done, this the 17th day of September 1964.

WALTER P. GEWIN,
Circuit Judge.

SEYBOURN H. LYNNE,
District Judge.

H. H. GROOMS,
District Judge.

[Caption omitted]

Before GEWIN, *Circuit Judge,* and LYNNE and GROOMS, *District Judges.*

PER CURIAM: This is a suit by the owners and operators of a restaurant business in Birmingham, Alabama, seeking to enjoin the enforcement of the provisions of title II of the Civil Rights Act of 1964 [1] on the ground that they are unconstitutional. A statutory three-judge court was convened pursuant to 28 U.S.C.A. § 2282, and the case was set down for hearing on September 1, 1964, on plaintiffs' prayer for a temporary injunction. Prior to the hearing the defendants moved to dismiss the complaint on the separate grounds that (1) the court lacks jurisdiction over defendant Robert F. Kennedy [2] as Attorney General of the United States, because of insufficient service of process; (2) since defendant Robert F. Kennedy is an indispensable party, the insufficiency of service of process upon him renders co-defendant Macon L. Weaver, United States Attorney for the Northern District of Alabama, an improper party defendant; (3) the complaint fails to state a claim upon which relief can be granted; and, (4) the court lacks equitable jurisdiction because plaintiffs have an adequate remedy at law. This motion was heard by and submitted to the full court on briefs and oral argument of counsel on September 1, 1964, and was taken along with plaintiff's prayer for a temporary injunction.

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[1] Public Law 88-352; 78 Stat. 241.

[2] Since Robert F. Kennedy tendered his resignation as Attorney General of the United States, which was accepted after submission of this case to the court and since Nicholas deB. Katzenbach has been appointed Acting Attorney General of the United States, the said Katzenbach is hereby substituted, in his official capacity, for the said Kennedy as a party defendant, as provided by Rule 25(d)(1) Fed. R. Civ. P.

745-696—64——2

THE MOTION TO DISMISS

The first two grounds for dismissal, both based upon the theory that service of process upon the Attorney General was defective, are no longer in issue. Service of process upon the Attorney General was made initially by certified mail in accordance with the provisions of 28 U.S.C.A. § 1391(e), and defendants contended that because fictitious parties were joined as defendants the provisions of section 1391(e) were inapplicable. Thereafter, plaintiffs amended their complaint by striking and dismissing therefrom the unserved fictitious parties and caused the complaint as amended to be re-served upon the Attorney General under section 1391(e). It was conceded by counsel for defendants on argument that the first two grounds in their motion to dismiss were thereby eliminated and accordingly are considered abandoned.

Defendants have also insisted in their brief and oral argument that the complaint does not present an actual controversy between the parties and that the adequacy of legal remedies deprives this court of equitable jurisdiction. These grounds were argued in the hearing on plaintiffs' prayer for temporary injunction at which evidence was adduced developing the undisputed facts set out below.[3]

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[3] 1. Plaintiffs are partners operating a restaurant under the trade style "Ollie's Barbecue" at 902 Seventh Avenue South, in Birmingham.

2. The plaintiffs' family has operated such restaurant under the same name and at the same location since 1927.

3. Plaintiffs' restaurant specializes in barbecued meats and homemade pies; approximately 90 to 95 per cent of its sales consist of such items and nonalcoholic beverages.

4. Plaintiffs' restaurant, when filled to capacity, will seat approximately 220 persons; its trade is derived from local regular customers who are for the most part known to the

Contending that there has not been a sufficient showing of a specific threat of immediate enforcement of title II of the act as to the plaintiffs, defendants insist

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plaintiffs; its trade is predominantly composed of white collar business people and family groups. Plaintiffs feature in their restaurant a wholesome atmosphere in which no profanity or consumption of alcoholic beverages is allowed. The restaurant is closed on Sunday. Plaintiffs have in the past declined service to persons who have been profane and have given the appearance of drinking alcoholic beverages.

5. Plaintiffs' restaurant is located in an area of Birmingham in which are located primarily residences occupied by Negroes and light industrial development; in the nearby vicinity are several Negro churches and schools attended by Negro children.

6. The restaurant is eleven blocks from the nearest interstate highway, a somewhat greater distance from the nearest railroad station and bus station and between six and eight miles from the nearest airport.

7. Plaintiffs seek no transient trade and do no advertising of any kind except for the maintenance of a sign on their own premises. To their knowledge plaintiffs serve no interstate travelers.

8. In the twelve months preceding the passage of the Civil Rights Act of 1964, plaintiffs purchased approximately $150,000 worth of food, all locally. Approximately 55 per cent of this was for meat and between 80 and 90 per cent of the meat purchases were from George A. Hormel & Company, at its Birmingham branch. Its purchases from Hormel for that period were shown to be $69,783. All of the meat purchased from Hormel was shipped to its Birmingham branch from outside the State of Alabama.

9. Plaintiffs employ 36 persons at their restaurant, approximately two-thirds of whom are Negro. Plaintiffs personally prepare food and serve customers. Plaintiffs and some of their employees would not voluntarily serve meals to Negroes.

10. Since July 2, 1964, plaintiffs have not complied with the Civil Rights Act of 1964; they have, in fact, on more than one occasion, refused service to Negroes on an equal basis with

alternatively that it is not alleged that defendants either have instituted enforcement proceedings against the plaintiffs or have conducted an investigation to determine whether plaintiffs have violated the act, and that insufficient facts are alleged to bring the plaintiffs within the coverage of the act.

In urging that the allegations are insufficient to show coverage, defendants point first to averments in the complaint respecting the remoteness of plaintiffs' business from any place normally frequented by interstate travelers, the absence of any advertising by them and the averment that to their knowledge they serve no "interstate travelers" as that term is used in the act. It is true that these allegations, substantiated by evidence at the hearing, tend strongly to indicate an absence of coverage under title II insofar as it relates to a restaurant which "serves or offers to serve interstate travelers," and defendants have made no contention that they are covered by virtue of that part of the act.

Defendants then seize upon the averment that "some" of the food served in plaintiffs' restaurant originated in some form outside of Alabama. This use of the word "some", say defendants, is insufficient because the act uses the term "substantial" in defining the portion of a restaurant's food which must move in commerce in order that it be within the al-

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white customers and on such occasions plaintiffs have been in actual violation of the act.

11. Because of their location and the manner of conducting their business, plaintiffs would lose a substantial amount of business if forced to serve Negroes in their restaurant. From its beginning, plaintiffs' restaurant has served only white trade.

12. A substantial portion of the food served in plaintiffs' restaurant has moved in commerce and plaintiffs have, since July 2, been in violation of the Civil Rights Act of 1964.

ternative criterion of coverage prescribed by section 201(e)(2). We are of the opinion that the meaning of the term "substantial" as there used must and can only be determined judicially, and we conclude as a matter of law, on the basis of objective evidence, that a "substantial" portion of the food served by plaintiffs has moved in commerce within the meaning of the act.

As defendants note, the complaint avers neither that enforcement proceedings have been instituted against plaintiffs nor that their restaurant was investigated by defendants prior to the commencement of the action. Plaintiffs do aver that prior to its filing they had violated the provisions of title II applicable to their restaurant by refusing to provide service to Negroes on the same basis as they provide to their other customers, and the evidence shows that since its commencement they have consistently continued and will continue thus to violate the act. In this respect alone the circumstances of this case are quite different from those existing in the cases urged by defendants in support of their position that this suit presents no justiciable controversy.

One of the plaintiffs testified further that he was caused in large part to institute this action by the fact that the defendants two days previously had filed in this court an enforcement suit against other persons operating restaurants of a similar character,[4] and it appears from the complaint in that suit that the act's coverage was invoked in part upon the basis that a substantial part of their food had moved in commerce. And plainly the Attorney General has indicated an intention to enforce the provisions of title II as against its violators. We cannot say, in these circumstances, that enforcement against plain-

[4] Civil Action No. 64-443, Northern District of Alabama.

tiffs was not reasonably imminent when this action was commenced, and no case cited by defendants or found by us has held under comparable circumstances that for this reason an actual controversy did not exist.

There are, moreover, many instances in which a threat of imminent enforcement of a law has not been considered requisite to the existence of a justiciable controversy or the exercise by federal courts of equitable jurisdiction in similar suits seeking anticipatory relief from the operation and enforcement of the law.

In their complaint plaintiffs attack the validity of title II of the act in its entirety. The act requires in positive terms that the plaintiffs, in the operation of their restaurant, afford to all persons "the full and equal enjoyment of the goods, services [and] facilities." Consequently, as to the plaintiffs, title II creates a mandatory duty to which it commands immediate obedience. As against this, the plaintiffs contend, and it is the object of this suit to determine, that they have a constitutional right to operate their business free of the restrictions now imposed upon it by the act. They aver, and have shown by evidence, that these requirements of title II will cause substantial and irreparable injury to their business. Thus, the substance of the allegations and proof is that the provisions of title II and the duty it imposes constitute a present injurious inpingement upon the plaintiffs' property rights. The existence of a justiciable controversy as well as the equitable jurisdiction of the federal courts and the right to injunctive relief have been unheld often under similar circumstances. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Pub-*

lic Utilities Comm'n of California v. *United States,* 355 U.S. 534 (1958); *Adler* v. *Board of Education,* 342 U.S. 485 (1952); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Currin* v. *Wallace,* 306 U.S. 1 (1939); *Terrace* v. *Thompson,* 263 U.S. 197 (1923); *Wickard* v. *Filburn,* 317 U.S. 111 (1942). It is our considered opinion that these decisions are controlling upon the present case and that defendants' motion to dismiss the complaint therefore should be overruled.

THE MERITS

Having negotiated the procedural hurdles, we proceed to an examination of title II of the Civil Rights Act of 1964:

> SECTION 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title *if its operations affect commerce,* or if discrimination or segregation by it is supported by State action: * * *
>
> * * * * *
>
> (2) *any restaurant,* cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> * * * * *
>
> (c) *The operations of an establishment affect commerce within the meaning of this title if* * * * (2) *in the case of an establishment de-*

scribed in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, *has moved in commerce.* * * *

(Emphasis supplied.)

Contending that the foregoing portions of the act, as applied to the local business which they operate, are unconstitutional, plaintiffs insist that when private establishments within the confines of the respective states, in the lawful and legitimate exercise of their private discretion, wish to select their customers there is no power, under the Constitution, or any of its amendments, granted to the federal government to regulate such private accommodations.

The heart of the federal compact beats in the tenth amendment of the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus it is to the Constitution and its amendments that we must look to determine whether Congress possesses the power it has in this instance sought to exercise.

Insofar as we can determine from a review of the legislative history of the act[5] and the extensive debates in the Senate relevant to title II,[6] the only three suggested sources of congressional power were

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[5] 11 U.S. Code Cong. & Ad. News 1727–1891, 88th Cong., 2d Sess. (July 20, 1964).

[6] V Cong. Rec. 4757, 4593–4598, 4643–4655, 4680–4681, 4833–4835, 4906, 5066–5072, 5091–5104; VI Cong. Rec. 5454–5458, 5539–5543, 5690–5693, 5770–5771; 5851–5855, 5365–5871, 5879–5889, 6003, 6212-6214, 6234–6240; VII Cong. Rec. 6307, 6334–6344, 7039–7041; VIII Cong. Rec. 7552–7558, 7677–7684, 7816–7825, 7837–7854, 7966–7967, 8029, 8092, 8371, 8805–8806; IX Cong. Rec. 8849. (1964).

the thirteenth amendment, the fourteenth amendment, and the commerce clause.

At oral argument counsel for defendants forthrightly stated their opinion that the thirteenth amendment was neither authority for nor prohibitory of this legislation. We agree, thereby rejecting the argument of plaintiffs that the effect of such act is to impose upon them a condition of involuntary servitude in violation of such amendment.[7]

It cannot be successfully contended that the above quoted portions of the act may be constitutionally applied to these plaintiffs under the grant of legislative power contained in the fourteenth amendment[8] since it was conceded at oral argument that the State of Alabama, in none of its manifestations, has been involved in the private conduct of plaintiffs in refusing to serve food to Negroes for consumption on the premises. *Civil Rights Cases,* 109 U.S. 3 (1883); *Peterson* v. *Greenville,* 373 U.S. 244 (1963).

In any discussion of the commerce clause as a grant of power to the national government to regulate activities commonly described as private and local we keep in mind the admitted fact that a majority of sincere and conscientious members of Congress believed this legislation to be in the national interest and necessary to end practices which they consider debasing to human dignity. Of course, we express

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[7] *Compare:* Butler v. Perry, 240 U.S. 328 (1916); Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); State v. Sprague, 32 U.S.L.Week 2610 (New Hampshire Sup. Ct. 1964); Scheiber, *The Thirteenth Amendment and Freedom of Choice in Personal Service Occupations: A Reappraisal,* 49 Cornell L.Q. 508 (1964).

[8] Section 5 thereof reads as follows: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

no opinion as to the wisdom of the legislation and confine our consideration to the constitutionality of the provisions with which we are concerned.

The commerce clause, appearing in article 1, section 8 of the Constitution, reads as follows:

> "The Congress shall have Power * * *
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> * * * * *
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> * * * * *
>
> * * *—And to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *."

The language is simple and unadorned. It has remained unchanged since 1789. With reference to it, to allay popular misgivings as to the nature and extent of powers vested in the Union by the new Constitution, James Madison wrote, "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."[9] And Alexander Hamilton made it clear that the commerce clause was intended to restrain the "interfering and unneighborly regulations of some states."[10] In spite of its simplicity and clarity and because of the constantly increasing "interpenetrations of modern society,"[11] it has spawned thousands of cases.

In *Civil Rights Cases*, 109 U.S. 3 (1883), at page 10, Mr. Justice Bradley characterized section 1 of the Civil Rights Act of 1875: "Its effect is to declare, that in all inns, public conveyances and places of amusement, colored citizens, whether formerly slaves or not,

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[9] The Federalist No. 45 (Madison).

[10] The Federalist No. 22 (Hamilton).

[11] *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 650 (1944).

and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and *vice versa.*" Thereafter, he posed and answered a question: "Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments [thirteenth, fourteenth and fifteenth]." Since the commerce clause had been in the Constitution for almost one hundred years and since we are advised that the Solicitor General in brief had urged upon the court the sufficiency of its grant of power to sustain the challenged legislation, Mr. Justice Bradley's pronouncement is, to say the least, highly intriguing and might be accorded more than persuasive authority but for the subsequent statement in *Butts* v. *Merchants Transp'n Co.,* 230 U.S. 126 (1913), at page 132:

> "The question of the constitutional validity of those sections came before this court in *Civil Rights Cases,* 109 U.S. 3, and upon full consideration it was held (a) that they received no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and by their terms, they were not enacted in the exertion of that power * * *."

While we shall not attempt the impossible task of a precise delineation of the contours of the power to regulate interstate commerce granted the Congress or the Herculean labor of analyzing the multitudinous cases dealing with various aspects of what may be termed primary and implied power, we shall make an effort to distill from the decided cases a definitive statement of such power which may be applied to this case only.

Some presuppositions are pe[illegible]ssible; indeed they are required by the teaching of *Wickard* v. *Filburn*, 317 U.S. 111, 120, "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195."; of *Swift* v. *United States*, 196 U.S. 375, 398, "* * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."; of *The Pipe Line Cases*, 234 U.S. 548, 560–61, "The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution * * *."; and, of *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 30, "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

Proceeding to explicate our understanding of the nature and extent of the power with which we are concerned, it is quite unnecessary to labor the obvious, that the commerce clause constitutes an express grant of power to Congress to regulate interstate commerce, which consists of the movement of persons, goods or information from one State to another. The cases are legion sustaining its exercise in this area.[12] Its power

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[12] *E.g. United States* v. *International Boxing Club*, 348 U.S. 236 (1955); *United States* v. *Shubert*, 348 U.S. 222 (1955); *Radovich* v. *National Football League*, 352 U.S. 445, 455 (1957); *United States* v. *Frankford Distilleries*, 324 U.S. 293 (1945).

is not restricted, however, to the regulation of interstate commerce. Congress is further invested with the power to regulate intrastate activities, but only to the extent that action on its part is necessary or appropriate to the effective execution of its expressly granted power to regulate interstate commerce.

The power of Congress to regulate wholly intrastate activities is brought into play only when those activities have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from practices within a State which burden its freedom or obstruct its flow.[13] The exercise of such power must necessarily be prospective, for the reason, that, unlike Tennyson's brook, interstate commerce does not run on forever. At some time it must come to an end within the boundaries of some State.[14]

This century has witnessed a dynamic expansion of federal control not only of the movements of commerce between the states but also of intrastate activities which have been found to burden its freedom or obstruct its flow. Thus Congress has exercised its power granted by the commerce clause to enact the

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[13] *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947); *Santa Cruz Co.* v. *NLRB*, 303 U.S. 453 (1938); *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1 (1937); *Edison Co.* v. *Labor Board*, 305 U.S. 197 (1938); *Labor Board* v. *Fainblatt*, 306 U.S. 601 (1939); *United States* v. *Darby*, 312 U.S. 100 (1941).

[14] *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824); *Schecter Corp.* v. *United States*, 295 U.S. 495 (1935); *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Welton* v. *Missouri*, 91 U.S. 275 (1875); *Bowman* v. *Chicago & N. Ry.*, 125 U.S. 465 (1888); *Packer Corporation* v. *Utah*, 285 U.S. 105 (1932); *Florida* v. *United States*, 282 U.S. 194 (1931); *Yonkers* v. *United States*, 320 U.S. 685 (1944); *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939).

Robinson-Patman Act,[15] the Federal Food, Drug and Cosmetic Act,[16] the White Slave Laws,[17] the Gambling Devices Transportation Act,[18] the Agricultural Adjustment Act of 1938,[19] the Fair Labor Standards Act,[20] and the National Labor Relations Act,[21] among others.

Concededly, the latter three, in broad extension of federal control, have immediate, direct, and practical impacts upon activities which were at one time considered wholly intrastate in nature thus resting in the domain of state control.

In each instance Congress cautiously made clear legislative findings that the regulation of the intrastate practices dealt with was necessary or appropriate to the effective execution of its expressly granted power to regulate interstate commerce. In the National Labor Relations Act such findings are set forth in 29 U.S.C.A. § 151. Moreover, assurance was given that regulation of essentially local matters would apply only where there was an actual effect on interstate commerce by requiring that this be determined administratively or judicially on a record in each individual case. 29 U.S.C.A. §§ 159(c) and 160(a). In the Agricultural Adjustment Act Congress made elaborate findings to establish an effect on commerce of the intrastate activities sought to be regulated. 7 U.S.C.A. §§ 1311, 1321, 1331, 1341, 1351, 1357, 1379(a), and 1380.

The Fair Labor Standards Act contains a built-in limitation on its enforcement by requiring a judicial

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[15] 52 Stat. 446 15 U.S.C.A. § 13(c).

[16] 52 Stat. 1040, as amended, 21 U.S.C.A. §§ 301–392.

[17] 36 Stat. 825, as amended, 18 U.S.C.A. §§ 2421–2424.

[18] 64 Stat. 1134, 15 U.S.C.A. §§ 1171–1177.

[19] 52 Stat. 31, as amended, 7 U.S.C.A. §§ 1281–1407.

[20] 52 Stat. 1060, as amended, 29 U.S.C.A. §§ 201–219.

[21] 49 Stat. 449, as amended, 29 U.S.C.A. §§ 151–159.

determination of the ultimate fact that acts of employers or employees actually affect such commerce on a case by case basis.

The Civil Rights Act of 1964 contains no legislative findings and we proceed to a critical examination of its provisions to determine whether it may nevertheless successfully survive the constitutional challenge. It is our opinion that neither of the three above-mentioned acts is an apposite analogy and that the cases arising thereunder afford scant persuasive authority beyond the broad principles enunciated therein.[22]

The duty of this court is classically defined in *United States* v. *Butler*, 297 U.S. at pages 62 and 63:

> "There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land

[22] That the National Labor Relations Act may not be analogized to the Civil Rights Act of 1964 and that the power of Congress is not plenary with respect to the regulation of activities not themselves interstate commerce is made crystal clear by Mr. Justice Black's concurring opinion in *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 652:

"The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely 'affecting' such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to interstate commerce * * *. In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation * * *. It has insisted upon 'suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.' * * *."

ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves no[r] condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends.

"The question is not what power the Federal Government ought to have but what powers in fact have been given by the people. It hardly seems necessary to reiterate that ours is a dual form of government; that in every state there are two governments,—the state and the United States. Each State has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the States, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members."

Paraphrased, for clarity of discussion, title II of the act declares that no restaurant may refuse service to any person because of his race, color, religion, or

national origin either if it serves or offers to serve interstate travelers or a substantial portion of the food which it serves has moved in commerce.

No case has been called to our attention, we have found none, which has held that the national government has the power to control the conduct of people on the local level because they may happen to trade sporadically with persons who may be traveling in interstate commerce. To the contrary, see *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir. 1959); *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F. 2d 167 (8th Cir. 1959); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).

On the authority of the cases collected in footnote 14, *infra*, we believe it to be a settled rule of constitutional law that goods cease to constitute a part of interstate commerce, and become a part of the general property in a state, and amenable to its laws, when they are sent into a state, either for the purpose of sale or in consequence of a sale. The simple truth of the matter is that Congress has sought to put an end to racial discrimination in all restaurants wherever situated regardless of whether there is any demonstrable causal connection between the activity of the particular restaurant against which enforcement of the act is sought and interstate commerce.

If our premise is correct, Congress sought to achieve its end by the sophisticated means of first declaring a restaurant is a place of public accommodation if its operations affect commerce and by thereafter abandoning the "affect commerce" requirement by legislating what is tantamount to a conclusive presumption that its operations do affect commerce if it is proved either that it serves or offers to serve interstate travelers or that a substantial portion of the food which it serves has at some time, however re-

mote, moved in commerce. The courts will not sustain a presumption when there is "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot* v. *United States*, 319 U.S. 463, at 647–648. The issues presented in the instant case require our consideration of only that portion of the statute relating to restaurants which serve food "a substantial portion" of which "has moved in commerce."

If Congress has the naked power to do what it has attempted in title II of this act, there is no facet of human behavior which it may not control by mere legislative ipse dixit that conduct "affect[s] commerce" when in fact it does not do so at all, and rights of the individual to liberty and property are in dire peril.

We conclude that title II of the Civil Rights Act of 1964, as applied to the business operated by these plaintiffs, was beyond the competence of Congress to enact and that its enforcement against plaintiffs under the circumstances of this case would be violative of the fifth amendment of the Constitution of the United States, in pertinent part reading: "No person shall be * * * deprived of * * *, liberty, or property, without due process of law; * * *" Accordingly, they are entitled to the relief for which they pray.

This 17th day of September, 1964.

WALTER P. GEWIN,
Circuit Judge.

SEYBOURN H. LYNNE,
District Judge.

H. H. GROOMS,
District Judge.

APPENDIX B

Article I, Sec. 8, cl. 3 of the Constitution provides:

> The Congress shall have power * * * To regulate commerce * * * among the several states.

Section 201 of Title II of the Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241, 243, provides:

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
>
> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

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